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# In the Supreme Court
## of the United States

Case No. 584

JAMES QUENTIN ANDERSON,

*Petitioner,*

v.

C. T. GLADDEN, Warden, Oregon State Penitentiary,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

JAMES QUENTIN ANDERSON,
2605 State Street,
Salem, Oregon,
*In propria persona.*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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# In the Supreme Court
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Case No. _____

JAMES QUENTIN ANDERSON,

*Petitioner,*

v.

C. T. GLADDEN, Warden, Oregon State Penitentiary,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

The petitioner, James Quentin Anderson, in propria persona, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on July 7, 1961, No. 17,188.

**OPINIONS BELOW**

(1) Petitioner applied for a petition for writ of Habeas Corpus to the Klamath County (Oregon) Circuit Court on 13 June, 1956, said petition denied by Judge David R.

Vandenberg, on 10 July 1956; (2) appeal denied by the Oregon State Supreme Court on 13 November 1957, *Anderson v. Britton*, 212 Ore. 1, 318 P.2d 291 (petitioner originally filed the habeas corpus proceedings against Klamath County Sheriff M. J. Britton and was later transferred to the Oregon State Penitentiary, thus naming C. T. Gladden in the subsequent appeals in the instant case); (3) Certiorari to the Oregon State Supreme Court denied without opinion in May 1958, *Anderson v. Britton*, 356 U.S. 962, 2 L.Ed. (2d) 1068, 78 S. Ct. 999; (4) petition for Habeas Corpus to the United States District Court for the District of Oregon denied by the Honorable Judge John F. Kilkenny on 13 October 1960, *Anderson v. Gladden*, 188 F. Supp. 666; (5) appeal to the United States Court of Appeals for the Ninth Circuit denied 7 July 1961, No. 17,188, appendixed hereto as "A".

## JURISDICTION

This Honorable Court has jurisdiction to review the Ninth Circuit Court of Appeals decision under Title 28 U.S.C., sections 1254 (1) and 1257 (3); Rules of the United States Supreme Court, Rule 19 (a), (b).

## QUESTIONS PRESENTED

(a) In view of the fact that the State of Oregon has never had jurisdiction over Indians in Indian Country, is enabling legislation by the State of Oregon a constitutional prerequisite to its acceptance of the criminal jurisdiction proffered to Oregon by the United States Congress (83rd) in Public Law 280, 67 Stat. 588?

(b) Can the State of Oregon constitutionally assume criminal jurisdiction over United States Government land, such as the Klamath Indian Reservation (now the Winema National Forest) has become by reason of its purchase by the United States Federal Government from the Klamath-Modoc Tribes and Yahooskin Band of Snake Indians?

(c) Can the United States Court of Appeals for the Ninth Circuit ignore the Federal question presented on appeal and deny the constitutional rights of petitioner by calling the instant case a "state question", therefore a question that cannot be answered by the Federal Courts?

(d) Are the rights guaranteed to petitioner and other Indians by Treaty between the United States and the Klamath-Modoc Tribes and Yahooskin Band of Snake Indians (17 February 1870, 16 Stat 707, appendixed hereto as "B") such illusory rights that they may be summarily ignored?

(e) Can the United States, through a United States Attorney acting as intervenor, concede the United States Government's sovereign right as the Supreme Law of the Land in favor of the State of Oregon law?

(f) Can the constitutionally guaranteed rights of Due Process and Equal Protection of the Laws be denied petitioner by Public Law 280, 67 Stat. 588, which discriminates among Indians charged with committing crimes in Indian Country within the State of Oregon by denying to only certain Indians the treaty rights of trial in United States federal courts?

## STATUTES INVOLVED

(1) Treaty of 17 February, 1870, between the United States and the Klamath-Modoc Tribes and Yahooskin Band of Snake Indians, 16 Stat. 707, appendix "B";

(2) Public Law 280 by the 83rd Congress on August 15, 1953, 67 Stat. 588, appendix "C";

(3) Act of August 13, 1954, 68 Stat. 718, 25 U.S.C.A. § § 564-64w-1, not appendixed hereto since the Oregon State Penitentiary officials forbid petitioner to purchase or have in his possession any volumes of federal law or federal statutes.

## STATEMENT OF CASE

It is undisputed that petitioner is a Reservation Indian who was arrested and convicted by agents of the State of Oregon for an alleged murder which occurred on the Klamath Indian Reservation, State of Oregon, on 4 November, 1954.

Petitioner has not alleged that the United States Congress cannot enact laws governing Indians on Indian Reservations; petitioner *does* contend that Congress has no power to delegate to the State of Oregon its criminal jurisdiction over Indians on Indian Reservations as long as the Reservations exist as Indian Reservations.

Petitioner also contends that the State of Oregon has *never* had criminal jurisdiction over Indians in Indian Country and the courts below err when they hold that the United States Federal Government can "give the jurisdiction over Indians in Indian Country *back* to

the State of Oregon". See *Anderson v. Britton*, 212 Ore. 1, 318 P.2d 291 at page 300, paragraph [13], Appendix "E"; *Anderson v. Gladden*, 188 F. Supp. 666 at page 674, paragraph [10], Appendix "D"; *Anderson v. Gladden*, United States Court of Appeals for the Ninth Circuit No. 17,188, 7 July, 1961, at page 8, appendix "A".

Petitioner contends further that the State of Oregon cannot exercise criminal jurisdiction over and in Indian Country and on the United States' Winema National Forest (Klamath Indian Reservation is now the Winema National Forest through purchase of the Klamath Reservation by the United States), without enabling legislation by the Oregon Legislature whereby the State of Oregon formally accepts the criminal jurisdiction over Indians in Indian Country which the Federal Government seeks to delegate to the State of Oregon.

## SPECIFICATION OF ERRORS TO BE URGED

1. The United States Court of Appeals for the Ninth Circuit erred in failing to hold that the State of Oregon has never had criminal jurisdiction over Indians in Indian Country within the boundaries of Oregon and did not at the time of petitioner's trial and conviction have criminal jurisdiction over Indians in Indian Country;

2. The United States Court of Appeals for the Ninth Circuit erred in failing to hold that the State of Oregon cannot constitutionally assume police power delegated by the United States over Indians in Indian Country while said "Indian Country" still exists as such;

3. The United States Court of Appeals for the Ninth Circuit erred in holding that the relinquishment of federal criminal jurisriction over Indians in Indian Country is not properly a federal question but a state question and the Oregon State Supreme Court's most recent decision is binding upon the United States Federal Courts;

4. The United States Court of Appeals for the Ninth Circuit erred in affirming the court below in *Anderson v. Gladden*, 188 F. Supp. 666;

5. The United States Court of Appeals for the Ninth Circuit erred in not discharging Petitioner from his present confinement in the Oregon State Penitentiary.

## REASONS FOR GRANTING THE WRIT

(a) Petitioner does not contend that Congress cannot enact laws governing Indians in Indian Country; petitioner does contend that the State of Oregon does not have "inherent" nor "residual" police power over the Klamath Indians while on the Klamath Indian Reservation. Therefore the attempted delegation of police power by the 83rd Congress in Public Law 280, 67 Stat. 588, is unconstitutional without enactments by the Oregon State Legislature to accept the delegated criminal jurisdiction **BEFORE** the termination of the Klamath Indian Reservation is complete and final.

Oregon, whether an area governed by provisional government, whether a "territory", or whether a state, has *never* exercised criminal jurisdiction over Indians in Indian Country. Hence the Courts below are errone-

ous in their holdings that the Federal Government can turn the jurisdiction of Indians in Indian Country *back* to the State of Oregon when the Federal Government chooses to do so. The Federal Government cannot *return* to Oregon that which Oregon never had.

It is undisputed that the United States Federal Government exercised police power over Oregon Indians in the Indian Country of Oregon from the formation of the Oregon Territorial Government on August 14, 1848, until the enactment of Public Law 280, 67 Stat. 588, on August 15, 1953.

Much earlier even, in 1842, Dr. Elijah White was appointed Indian Agent by the United States Government, three (3) full years *before* Oregon set up their Provisional Government in 1845; therefore, the Provisional Government, much less the Territorial Government of Oregon, came too late to even contend inherent or residual police power over the Klamath-Modoc Tribes. Indeed, the United States Congress was legislating in regards to crimes committed by Indians against whites as early as 1796.

This was recently recognized by the Honorable Court in the case of *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 58 S. Ct. 799, at page 800:

> " * * * The findings show: In 1864 plaintiff held by immemorial possession more than 20,000,000 acres located within what now constitutes Oregon and California. By an Act (13 Stat. 37) of March 25 of that year the President was authorized to conclude with them a treaty for the purchase of the country they occupied. The treaty was made October 14 following. (Ratified July 2, 1866, proclaimed

> February 17, 1870, 16 Stat. 707). A proviso sets apart a tract retained out of the country a part of which was ceded to be held until otherwise directed by the President, as a residence for plaintiffs, with specified privileges. * * *"

See also *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 67 S. Ct. 167 at page 168:

> "* * *. The events giving rise to the claims here occurred as part of the opening and development of the territory of Oregon. After creating a government for that territory by Act of 1848 (9 Stat. 323), Congress in 1850 authorized the negotiation of treaties with Indian tribes in that area. Under the latter Act (9 Stat. 437), Anson Dart, later succeeded by General Joel Palmer, was appointed Superintendent of Indian Affairs for the Oregon region * * *."

In the Appellee's Memorandum to the United States District Court of Oregon, page 5, lines 1 through 11, it is said:

> "Many cases are cited in Petitioner's brief in support of the contention that Oregon had to take some affirmative action to gain Indian jurisdiction. But it is respectfully submitted that the cases are not in point. It is pointed out in *Williams v. Lee*, supra [358 U.S. 218 (1958)], that Arizona had, by express disclaimer in its Enabling Act (§ 20, 36 Stat. 569), refused jurisdiction over Indians and had so provided in its constitution (Art. xx, Fourth, Const. of Ariz.). Under this circumstance, state action was necessary before Arizona can assume jurisdiction over Indians within the state upon reservations. There is no such disclaimer or limitations in the Constitution of Oregon or its enacted laws."

*Why* is there no disclaimer or limitation in the Constitution of Oregon or its enacted laws? Clearly, because

the Provisional and Territorial Governments of Oregon recognized the fact that the Indians in the Oregon Country were a separate and distinct body of people and not subject to any laws other than tribal laws and or laws of the United States. From the time of the first man on the American Continent until the 1953 enactment of the 83rd Congress, Public Law 280, 67 Stat. 588, the State of Oregon has never claimed jurisdiction over the Klamath Modoc Tribes. The Klamath-Modoc Tribes had absolutely no contact with the white in the Oregon Country at the date of enactment of Oregon's Provisional Government; therefore, what may hold true for "Willamette Valley" or "Columbia Valley Indians" (though there was no assumption by Oregon of criminal jurisdiction over these tribes either) will not hold true for the Klamath-Modoc Tribes any more than what affect Mexico will necessarily affect Canada, as they are separate nations as were the early-day Indian Tribes. If this reasoning were not true, then why the separate treaties with the different tribes of Indians. Why didn't the federal government make one treaty do for all Indians? Because the tribes were considered each a quasi-sovereign entity.

*This*, — THIS RECOGNITION THAT OREGON NEVER HAD JURISDICTION OVER INDIANS IN INDIAN COUNTRY,—*explains the absence of a disclaimer of or limitation on Indian jurisdiction in the Oregon Constitution or enacted laws*. This was well recognized by the State of Oregon at a time much closer to the facts, in 1901, and the well reasoned opinion of Oregon Supreme Court Justice Wolverton in *State v.*

*Columbia George*, 39 Ore. 127, 65 Pac. 604 constituted the landmark case on the subject, and spelled out the established Oregon law which laid no claim to any state jurisdiction over crimes allegedly committed by Indians in Indian Country until your petitioner's case appeared before the Oregon Supreme Court. *State v. Columbia George* (1901), 37 Ore. 127, 65 Pac. 604:

> "Page 604 * * *. There is a grave responsibility imposed upon every court to be very sure that it is the law that condemns, and not the court, except as the correct and impartial instrumentality of the law; and in no case is this humane principle so impressively discovered to the understanding as where the life of a human being is suspended in the balance, whether the subject be of high or low degree. Yet, if the law condemns, its judgments should be certain, so as to insure respect, and an obedient observance of its behests. * * *.
>
> Page 605. "* * *. It was early the policy of the government to treat the various Indian tribes found within the territory as quasi independent peoples and nations, but under the protection and tutelage of the general government. They were recognized as having the possessory right to the soil over which they were wont to hunt and exercise a primitive authority, but not the ultimate title to the land itself. Of the latter they were denied ownership, and were not permitted to sell or dispose of it to any person or nation without the consent of the United States. They were never regarded as citizens or constituent members of our body politic with the rights and privileges of citizenship, and were subject only in a restrictive sense. They were amenable generally, when without the Indian Country, to the laws of the United States and of the state and territory where they may be within their respective jurisdiction, but were permitted to maintain their separate, independent communities and political organizations or primitive tribal rela-

> tions for the government of their own people. In permitting this, they were treated as wards in a state of pupilage, emerging from their savage condition to a higher civilization; and it was thought to be the better means to the end, while instructing them in the arts of industry and civilization, that they should be encouraged to become self-governing, as well as self-supporting. *Worcester v. Georgia*, 6 Pet. 515, 536, 8 L. Ed. 483; *Ex parte Crow Dog*, 109 U.S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; *U. S. v. Kagama*, 118 U.S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. * * *"
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> * * *
>
> Page 616. "* * *. The state courts have never had jurisdiction over Indians within the Indian country or upon Indian reservations, except as and in so far as the general government has relinquished the supervisory control and authority over them. The acts under consideration are not indicative of such a purpose; hence it follows that the state court is without jurisdiction of the offense charged." [murder]. * * *."

In view of this fact, the Courts below err grievously in holding that the Federal Government can *RETURN* the jurisdiction of Indians in Indian Country to the State of Oregon when the Federal Government chooses to do so. It is patently impossible to *return* to the State of Oregon that which the State of Oregon never had—criminal jurisdiction over crimes allegedly committed by Indians in Indian Country.

Petitioner concedes that the Federal Government can terminate its jurisdiction over crimes committed by Indians in Indian Country. Nevertheless, the fact remains that the State of Oregon has never had jurisdiction over crimes committed by Indians in Indian Country. Therefore, enabling legislation by the Oregon lawmakers is essential to a proper assumption of criminal

jurisdiction over the Klamath Indian Reservation *before complete termination of the Klamath Indian Reservation.* What of the 474 tribal members that elected to remain Reservation Indians? The entire tribe's hunting and fishing rights are unimpaired and not subject to the State of Oregon's law. (See *Klamath & Modoc Tribes, etc. v. Maison*, infra.)

Appendixed hereto as appendix "F" is the withdrawal form signed and notarized by petitioner in 1958 showing that petitioner was a reservation Indian at that late date and was, and still is, a ward of the United States Federal Government, and will be a dependent of the federal government until the Termination payment is complete. There are presently two separate cases for adequate payment of the Klamath Indian Reservation by Klamath tribal members in the United States Court of Claims, Washington, D. C., and petitioner still has a vested right in his ancestral home until the Termination litigation is completely settled.

(b) A presidential proclamation was issued on July 26, 1961, establishing the Klamath Indian Reservation as the "Winema National Forest." The State of Oregon has no legal jurisdiction over a United States National Forest unless appropriate legislative steps are taken, yet, the State of Oregon has so assumed police power within and over the Winema National Forest.

(c) The recent Oregon Supreme Court opinion, *Anderson v. Britton*, 212 Ore. 1, 318 P 2d 291, considers the identical question considered in *State v. Columbia George*, supra. In considering petitioner's case, the Oregon Supreme Court now says:

"* * *. The real question involves consideration of the fundamental nature of the federal power over Indian affairs. *If that power is inherent solely in the federal government, to the necessary exclusion of the state, then the question of delegation may become important.* But if the state has residual power over Indians and Indian territory, which is merely in suspension so long as the federal government chooses to occupy the field, then a withdrawal by the federal government does not vest any new power in the state but merely removes an impediment to the exercise of pre-existing power.

"Page 301. * * *. It follows that the treaty of 1870 did not bind the United States to maintain its police power perpetually over the tribe, to the exclusion of the state. On the contrary, the treaty (so far as is here concerned) was on a parity with the federal criminal laws relating to Indians on Indian reservations, and either could be modified by subsequent enactment. The treaty was not the source of federal power, but it was merely a means by which the EXISTING, BUT DORMANT, FEDERAL POWER WAS EXERCISED. Upon its exercise the rights of the state were suspended until such time as the federal pre-emption should be relinquished, and the relinquishment could be accomplished by congressional act. What, then, were the rights of the state prior to the Treaty of 1870?

"By the act admitting Oregon as a state (February 14, 1859, 11 Stat. 383) Oregon was received into the Union 'on an equal footing with the other States in all respects,' and there was no exclusion of any jurisdiction over either Indians or Indian territory. The operation of federal statutes then, as now, being limited to 'Indian country' (Act of March 27, 1854, 10 Stat. 270, ch. 26, § 3) and there being no 'Indian country' defined as such with respect to the Klamaths prior to 1870, it follows that between 1859 and 1870 the Klamaths, and the area later to become

the Klamath reservation, were subject to state jurisdiction." *Anderson v. Britton*, 212 Ore. 1, 318 P2d 291 at 301.

Although this opinion even states "the existing, but dormant, federal power was exercised," and in so ruling admits the federal government had police power over Indians **BEFORE** Oregon was even thought of but then they go on to say that the delegation of police power by Public Law 280 would be important if Oregon did not have complete police power over Indians **BEFORE** the United States Federal Government, and since Oregon had such pre-existing power, the "delegation of police power" was not at issue.

*Moreover, the Columbia George opinion being written and reasoned at a time so much closer to the Provision and Territorial Governments, the Court clearly was in a better position then to know the true situation.*

"In 1953, Congress enacted Public Law 280, 83rd Congress, 1st session (67 Stat. 588, 590) that consented to the assumption of jurisdiction over Indians by the states. The pertinent section provides:

"'Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a state, *the consent of the United States is hereby given to the people of any state to amend*, where necessary, *their state* constitution or *existing statutes*, as the case may be, *to remove any legal impediment to the assumption of civil and criminal jurisdiction* in accordance with the provisions of this Act: * * *' (Italics supplied)

"Pursuant thereto, the Washington legislature adopted Laws of 1957, chapter 240, p. 941 (RCW 37.12).

"In *State v. Paul*, 53 Wn. (2d) 789, 337 P. (2d)

33, appeal dismissed 361 U.S. 898 (1959), this court held chapter 240, supra, constitutional.

"The statute does not vest state courts with civil and criminal jurisdiction over Indians on Indian reservations; it only gives the tribal council, or other governing body, the right to petition the governor for the issuance of a proclamation placing the people and lands of the tribe under civil and criminal jurisdiction of the state. * * *.

"* * *, *or the Legislature unconditionally assumes jurisdiction, as authorized by the 1953 Congressional Enactment, jurisdiction over crimes committed by Indians in Indian Country will remain in the federal courts.*" (Emphasis added)

Decisions are legion by the courts of the land that Indians in Indian Country have inherent jurisdiction to police their own except insofar as the United States Federal Government acquired and exercised jurisdiction over Indians in Indian Country, and Oregon is the only state that claims "inherent" or "residual" police power over Indians in Indian Country.

The State of Oregon claims inherent police power over Indians in Indian Country, yet will not allow an Indian to serve on a grand or petit jury. Petitioner has the Klamath County (Oregon) Grand Jury Lists from 1937 to 1956 inclusive and not one Indian has ever served on said grand jury, thus a clear case of racial discrimination.

The opinions below all disregard the fact that the petitioner, being of Indian blood and a duly enrolled tribal member, should be granted the same constitutional rights as all other citizens of the United States as guaranteed by the various Amendments to the United States Constitution and particularly the 14th Amendment guaranteeing

Due Process of Law and Equal Protection of the Laws. The State of Oregon wants jurisdiction to prosecute the Indian but the State of Oregon has always systematically excluded *ALL* Indians from jury duty because of their race and color. The courts of the State of Oregon fragrantly discriminate against the Indian residents of Oregon who no longer even live on the reservations, so how can a reservation Indian receive anything but rank discrimination from Oregon?

The federal opinions below in the instant case are shocking inasmuch as the United States District Court Judge for the District of Oregon, the Honorable John F. Kilkenny, unable to otherwise deny petitioner the habeas corpus petition from the denial of which this appeal originated, inserted in said habeas corpus petition that the deceased "was a white man" and therefore *United States v. Kagama*, 118 U.S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228, did not apply to the instant case. Petitioner made much of this to the 9th Circuit Court of Appeals, that the District Judge had absolutely no right to insert "the deceased was a white man" and then base his denial on his addition. The 9th Circuit Court of Appeals completely ignored this fact and evaded squarely answering the appeal to them and all points and arguments presented by saying:

> Page 7. "* * *. Whether the courts of Oregon, upon the relinquishment of federal jurisdiction in this field, had jurisdiction under then existing state law to try Indians for such offenses is a state question. The courts of Oregon have decided that question, having held in *Anderson v. Britton*, 212 Ore. 1, 15-20, 318 P.2d 291, 297-298, that no implementing state

legislation was needed. That determination is binding upon us. * * *."

Petitioner understands that the 9th Circuit Court of Appeals refused to decide the crux of this whole litigation and based its refusal to rule on the contention that petitioner did not reallege the delegation of police power to the federal courts. Petitioner asked numerous times for his attorney to reallege said unconstitutional delegation of police power to the state from the federal government but said lawyer assured petitioner over and over again that the United State Federal Courts were fair and impartial and would decide any and all points fairly presented to the lower courts and particularly any state court opinion would be decided on each question. Such is not the case here: all the courts below have found one way or another of avoiding the issue and petitioner has not, and cannot, get an adequate court decision on the merits of the case presented.

This whole litigation revolves around whether or not the State possesses inherent state police power over Indians in Indian Country, and none of the federal courts below will adjudicate that point; instead, they fall back on the self-contradictory Oregon Supreme Court opinion in *Anderson v. Britton*, supra. For this reason this petitioner prays this Honorable Court to grant Certiorari, and to fully and finally adjudicate the questions regarding inherent state jurisdiction over Indians in Indian Country.

"* * *. Originally the Indians tribes were separate nations within what is now the United States. * * *." *Williams v. Lee*, 79 S. Ct. 269.

In *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, at pages 1112-1113, this Court said:

> "* * *. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided. * * *."

In *Squire v. Capoeman*, 351 U.S. 1, 76 S. Ct. 611, this Court, Mr. Chief Justice Warren delivering the opinion, said:

> "* * *. When white men first came to the Olympic Peninsula, in what is now the State of Washington, they found the Quinaielt Tribe of Indians and their neighboring allied tribes occupying a tract of country lying between the Coast Range and the Pacific Ocean. This vast tract, with the exception of a small portion reserved for their exclusive use, was ceded by the Quinaielts and their neighbors to the United States in exchange for protection and tutelage by the Treaty of July 1, 1855, and January 25, 1856, 12 Stat. 971. * * *."

In *United States v. Jacobs*, 113 F. Supp. 203 (1953), the United States District Court for the Eastern District of Wisconsin ruled, at page 205:

> "* * *. [1] To understand the legislative intent regarding the Ten Major Crimes Act, it is necessary to examine its history. Basically, it must be understood that an Indian tribe is an independent self-governing political body. This principle was first clearly announced by Chief Justice Marshall in *Worcester v. State of Georgia*, 1832, 6 Pet. 515, 31 U.S. 515, 8 L. Ed. 483. It should further be understood that the policy of the United States, as reflected

by congressional legislation and the administration of such legislation, provides that "the relations of the Indians among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise." *United States v. Quiver*, 241 U.S. 602, 605, 36 S. Ct. 699, 700, 60 L. Ed. 1196. These self-governing powers, lawfully invested in an Indian tribe, ARE NOT POWERS WHICH HAVE BEEN DELEGATED BY ACTS OF CONGRESS, BUT ARE INHERENT POWERS OF TRIBAL SOVEREIGNTY WHICH HAVE NEVER BEEN EXTINGUISHED. Cohen, *Handbook of Federal Indian Law*, p. 122.

"So clear were these principles that in 1883 in the case of *Ex parte Crow Dog*, 109 U.S. 556, 3 S. Ct. 396, 27 L. Ed. 1030, the United States Supreme Court held that federal courts had no jurisdiction to prosecute an Indian for the murder of another Indian on an Indian reservation, SUCH JURISDICTION NEVER HAVING BEEN WITHDRAWN FROM THE ORIGINAL SOVEREIGNTY OF THE INDIAN TRIBE. * * *." (Emphasis added)

Our sister state of Washington recently made a very clear and adequate ruling dealing with petitioner's identical problem in *Arquette v. Schneckloth*, — P.2d — (Wash., 1960), Mr. Chief Justice Weaver delivering the court's decision:

"* * *. The Assimilative Crimes Act applies to Indian Country. *Williams v. United States*, 327 U.S. 711, 90 L. Ed. 962, 66 S. Ct. 778 (1946). By reason of this, an enrolled Indian was properly prosecuted in federal court for an act committed in Indian Country, EVEN THOUGH THE ACT WAS MADE CRIMINAL BY STATE STATUTE. *United States v. Sosseur*, 181 F. (2d) 873 (7th Cir. 1950). (Emphasis added)

"In *In re Denetclaw*, 83 Ariz. 299, 303, 320 P. (2d) 697 (1958), the petitioner, an enrolled Indian, plead guilty in justice court to the charges of driving under the influence of intoxicating liquor and of reckless driving within the exterior boundaries of the Navaho Indian Reservation. The supreme court of Arizona upheld the trail court's release of the petitioner on a writ of *habeas corpus*, saying:

" 'By enactment of the Assimilative Crimes Act (18 U.S.C.A. § 13th, the Congress expressly adopted the criminal laws of the States for areas within federal jurisdiction. For an excellent dissertation of this Act see *United States v. Cosseur*, 7 Cir., 181 F.2d 873. *The courts have repeatedly held that federal jurisdiction over offenses, either felonies or misdemeanors, committed by an Indian in Indian country is exclusive and not concurrent with state jurisdiction. United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228: *In re Blackbird*, D.C. 109 F. 139; *United States ex rel. Lynn v. Hamilton*, D.C., 233 F. 685; *State v. Jackson*, 1944, 218 Minn. 429, 16 N.W. 2d 752. Cf. *Williams v. United States*, 1946 Ariz., 327 U.S. 711, 66 S. Ct. 778, 90 L. Ed. 962.' (Italics supplied)

"In *State v. Begay*, 63 N. M. 409, 320 P. (2d) 1017 (1958), and *State ex rel. Bokas v. District Court*, 128 Mont. 37, 41, 270 P. (2d) 396 (1954), the courts reached the same conclusion. The Montana court said:

" 'We hold that, under the federal laws, the Indian ward, while residing on and being on and within the exterior boundaries of his Indian reservation, is under the *exclusive jurisdiction of his guardian, our Federal Government, in regard to all crimes recognized and made applicable to the Indian country by Congress.*' (Emphasis supplied)

"* * *

"In *In re Wesley v. Schneckloth*, 155 Wash. Dec. 89, 96, 346 P. (2d) 658 (1959), this court said:

> " 'We are aware of the diffculty our conclusions cause in the field of law enforcement * * * and of the related problems they raise * * * but the solution in this state lies in corrective legislation * * *, NOT IN UNAUTHORIZED ASSUMPTION OF JURISDICTION BY OUR STATE COURT.' (Emphasis added)

In *Anderson v. Gladden*, 188 F. Supp. 666, at page 672, Judge John T. Kilkenny's opinion goes astray several times in the instant case, one instance as follows:

> "The Preamble of the Organic Law of the Provisional government of Oregon, passed by the legislative committee of that group on July 5, 1845, and approved by the vote of the people prior to August 5, 1845, provided:
>
> " '* * *.
>
> "Article 1, § 3 of this Organic Law contains the following provision with reference to Indians:
>
> " '* * * the utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, THEY SHALL NEVER BE INVADED OR DISTURBED, UNLESS IN JUST AND LAWFUL WARS, AUTHORIZED BY REPRESENTATIVES OF THE PEOPLE * * *.' " (Emphasis added)

It is crystal clear that the people of the Oregon Country have recognized the Indians in Indian Country as independent people and not subject to the laws of the people of the State of Oregon in any respect and the courts below are all wrong in holding the State of Oregon has "residual" and "inherent" police power over Indians in Indian Country, and the instant case should be heard and the courts below reversed and petitioner placed under

federal jurisdiction for any alleged crime of murder by petitioner on the Klamath Indian Reservation.

(d) In the case of *State v. Lohnes*, 69 N.W.2d 508 (N.D. 1955), it was pointed out that the United States had treaty obligations to the Indians and must retain control over them and their lands until its obligation was fulfilled.

Congress, in recognition of these treaty obligations, has enacted 25 U.S.C.A. §§ 564-564x, a detailed, comprehensive and thorough plan for the termination of the federal supervision over the Klamath Indians. It is respectfully submitted that the Senate of the United States provided for a sensible, orderly and undiscriminatory manner of meeting the treaty obligations of the United States to the Klamath Tribes. The Tribes agreed to submit to and obey all laws and regulations which the United States might prescribe. Although the State of Oregon was then in existence, no reference was made to the state in that cession of jurisdiction, and as the Supreme Court said in *Rice v. Olsen*, 324 U.S. 786 (1945):

> "THE POLICY OF LEAVING INDIANS FREE FROM STATE JURISDICTION AND CONTROL IS DEEPLY ROOTED IN THE NATION'S HISTORY."

Petitioner contends that the State of Oregon has *never* exercised criminal jurisdiction over Indians in Indian Country and cannot now constitutionally assume police power delegated by the 83rd Congress, Public Law 280, 67 Stat. 588, to prosecute Indians in Indian Country, until the federal wardship and complete termination of the Klamath Indian Reservation is finalized by the issu-

ance of a Presidential proclamation as provided by 25 U.S.C.A., § § 564-564x on 15 August, 1961

The following decision of 13 March, 1956, by Chief Judge Gus J. Solomon of the United States District Court for the District of Oregon, speaks very clearly as to the Reservation rights of the Klamath Indians:

"Conclusions of Law".

"1. The Klamath and Modoc Tribes and Yahooskin Band of Snake Indians of the Klamath Reservation in the State of Oregon and the members thereof have an exclusive right, privilege or immunity afforded them under the treaty of October 14, 1864, 16 Stat. 707, between the said tribe and the United States, to hunt and trap upon the Klamath Indian Reservation without restriction or control, except such restriction or control as they may impose upon themselves.

"2. Public Law 280, 83d Cong., 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360, did not extend the hunting and trapping laws of Oregon to the Klamath Indian Reservation.

"3. It is unnecessary in this proceeding that the court pass upon the constitutionality of the said Public Law 280, 83d Cong., and the court makes no decision upon the constitutionality thereof.

"* * *."

*Klamath & Modoc Tribes, etc. v. Maison*, 139 F. Supp. 634, at 637 et seq.

The United States Congress cannot constitutionally separate the police power delegated to the State of Oregon by Public Law 280, 67 Stat. 588: it *cannot say that the State of Oregon has no police power over the Klamath Indian Reservation in regards to long-standing tribal hunting, fishing and trapping practices contrary to and*

*in violation of the State of Oregon laws, and in the same breath* (i.e., same Act of Congress, to-wit, Pub. Law 280, 67 Stat. 588) *say that the State of Oregon shall have police power over certain other crimes, heretofore exclusively federal, that are contrary to and in violation of the State of Oregon laws.*

It is clear from the above quoted language used by the Honorable Gus J. Solomon (139 F. Supp. at page 637), that the constitutionality of Public Law 280, 83d Congress, 67 Stat. 588, is much in doubt in his mind. Petitioner fervently urges this august body of Justices to hear this case, and to determine finally, once and for all, the constitutionality of Public Law 280 of the 83rd Congress, and to remand the petitioner to federal jurisdiction where he rightfully should be.

Yet in *Anderson v. Britton*, supra, the Oregon Supreme Court views the treaty promises of the United States as illusory rights granted to the Indians.

> "Therefore, if Public Law 280 in fact conflicts with the Treaty of 1870 **(WHICH IT IS UNNECESSARY TO DECIDE)**, the effect of the statute was to abrogate the treaty. Plaintiff has no such vested right in being tried by the federal, rather than the state courts, **AS WOULD ENTITLE HIM TO COMPLAIN OF THE ABROGATION**. And the withdrawal of federal control leaves the subject in the hands of the state, **WHERE IT WAS PRIOR TO THE TREATY**. * * *." (All emphasis added)
>
> *Anderson* v. *Britton*, 212 Ore. 1 at 23

Surely this is not so.

It does not seem unreasonable to interpret a treaty providing for a cession of control to the United States

Government and the creation of an Indian reservation upon which white persons were not permitted to locate and remain as providing that the federal control would be coextensive with the existence of the reservation. The Oregon Supreme Court assumed that the treaty could be modified when and how Congress chose. Petitioner submits that this is too broad a grant of power to Congress; it can only be modified by Congress in a manner which preserves the treaty rights of the Indians.

(f) It is worth noting that petitioner was indicted by a Klamath County, Oregon, Grand Jury which has systematically excluded *ALL* Indians from jury duty because of race and national origin; also, the petit jury from which petitioner's trial jury were selected, consisting of 81 names (two panels) had never carried as juror any person of the Indian race from the time of the formation of the State of Oregon up to and including the time of petitioner's trial. Only after petitioner was convicted and began inquiry into the discrimination against Indians for jury duty (and petitioner was not able to obtain petit jury list for over $2\frac{1}{2}$ years from trial), only then were two Indians abruptly placed on the 1955 petit jury lists. None ever appeared before petitioner's trial (these two Indians were carried for several terms and finally dropped again after the Indian woman served approximately eight months later on a civil trial). Oregon discriminates totally against Indians, yet Oregon is the only state of the Union which prosecutes so viciously any person of Indian blood.

Putting together all of the foregoing, we must accept the following as established: That contrary to the decision

in *Red Hawk v. Joines*, 129 Ore. 620, 634, 278 P. 572 (1929), relied on by the Oregon Supreme Court in *Anderson v. Britton*, supra, the State of Oregon has never had jurisdiction over Indians in Indian Country prior to Public Law 280 of the 83rd Congress; that the federal government has always had sole and exclusive jurisdiction over Indians in Indian Country save for that expressly reserved to the tribes, particularly with respect to major crimes by reason of the Ten Major Crimes Act which was enacted to fulfill treaty obligations with various Indian tribes; that these treaty obligations are real, substantial, valid and subsisting; that they were made with quasi-sovereign Indian tribes, having their own territorial jurisdiction over the areas involved; and finally, that in accordance with such treaty obligations, Congress has enacted a comprehensive, detailed and fair plan for the termination of the Klamath Indian Reservation, upon appropriate proclamation by the Secretary of Interior, providing for the special status of Indians as members of the tribes and wards of the government to cease at the time of such proclamation (25 U.S.C.A. §§ 564 to 564x), the Indians thenceforward to be subject to state law, not before.

It is most respectfully submitted that the obligations created by the Klamath-Modoc Treaty of 1864-1870 and the United States of America to maintain the Klamath Indian Reservation are concurrent and coextensive with the provision therein, whereby the Indians ceded jurisdiction to the Federal Government. The power and the jurisdiction of the Federal Government over the Indians may unquestionably be terminated, but it is apparent that these treaty obligations are not empty promises which

confer no rights on the Indians as against the Federal Government. They must be respected and dealt with in an appropriate manner.

If, as the three courts' opinions below seem to hold, the Indians acquired no rights under the treaties which the Congress need respect, this argument must fail. But, petitioner most strongly contends that this is not the case. No one, for instance, would seriously contend or argue that Congress could validly pass a law providing that the Indians no longer had any interest in the property comprising the Indian Reservations, and saying that despite the treaty provisions such reservations were exclusively the property of the Federal Government. But if such a law would be invalid, then the treaties have some force, even against Congressional enactment.

## CONCLUSION

For the foregoing reasons, petitioner most earnestly prays that this petition for a writ of certiorari be granted forthwith.

JAMES QUENTIN ANDERSON,
*Petitioner in Propria Persona.*

STATE OF OREGON
County of Marion } ss.

I, James Quentin Anderson, being first duly sworn on oath, depose and say: That I am the petitioner in the above-entitled cause; that I have personally prepared and read the contents of the foregoing petition for writ of certiorari; that I know the contents thereof and the same are true as I verily believe.

James Quentin Anderson
*Affiant.*

Subscribed and sworn to before me this 29 day of September, 1961.

/s/ Lotin R. Akin
Notary Public for Oregon.

My commission expires: 10-31-63

IN THE SUPREME COURT
OF THE UNITED STATES

JAMES QUENTIN ANDERSON,
Petitioner,

vs.

C. T. GIADDEN, Warden,
Oregon State Penitentiary,
Respondent.

PROOF OF SERVICE

State of Oregon )
) ss.
County of Marion )

I, James Quentin Anderson, petitioner in the foregoing Petition for Writ of Certiorari, hereby certify that I have served the said petition on Mr. Robert Y. Thornton, Attorney General for Oregon and attorney for Respondent, addressed to Attorney General's Office, Supreme Court Bldg., Salem, Oregon; a true and correct copy to the United States District Attorney, District of Oregon, United States Courthouse, Portland, Oregon; a true and correct copy to the Attorney General of the United States, Attorney General's Office, Washington 25, D.C.; 40 copies to Mr. James R. Browning, Clerk, Office of the Clerk, Supreme Court of the United States, Washington 25, D.C., on this 26 day of September, 1961, by prepaying first class postage thereon, in accordance with the rules and regulations of the Oregon State Penitentiary, said rules forbid posting of any document by airmail as required by the rules of this court, and duly addressed as shown above.

James Quentin Anderson
James Quentin Anderson, Affiant

Subscribed and sworn to before me this 27 day of September, 1961.

/s/ John R. Atkin
Notary Public for Oregon

My Commission Expires: 10-31-62

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES QUENTIN ANDERSON,
*Appellant*,
vs.
C. T. GLADDEN, Warden, Oregon State Penitentiary,
*Appellee*.

No. 17,188
July 7, 1961

Appeal from the United States District Court for the District of Oregon

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Before: HAMLEY, HAMLIN AND KOELSCH, Circuit Judges

HAMLEY, Circuit Judge:

James Quentin Anderson, serving a life term in Oregon State Penitentiary for second degree murder, appeals from a district court order denying his application for a writ of habeas corpus. The opinion and order of the district court are reported in *Anderson v. Gladden*, 188 F.Supp. 666.[1]

The homicide was committed November 5, 1954, on the Klamath Indian Reservation in Klamath County,

[1]Anderson's conviction in the Circuit Court of the State of Oregon for Harney County was affirmed by the Supreme Court of Oregon. *State v. Anderson*, 207 Ore. 675, 298 P.2d 195. That court subsequently affirmed an order of the Circuit Court of the State of Oregon for Klamath County denying Anderson's application for a writ of habeas corpus. *Anderson v. Britton*, 212 Ore. 1, 318 P.2d 291.

Oregon. Anderson is of Indian blood and at all times here in question was an enrolled member of the Klamath Tribe of Indians residing on that reservation. He seeks discharge from state custody on the ground that by reason of his race, his tribal membership, the place of the homicide, and the provisions of federal and state law then existing, the courts of Oregon lacked jurisdiction to try him for the crime of which he was convicted.

From February 14, 1859, when Oregon was admitted as a state, until August 15, 1953, Oregon did not claim or attempt to exercise jurisdiction to prosecute an Indian for a murder committed on an Oregon Indian reservation. During all that time the state acknowledged the exclusive jurisdiction of the federal courts in this field.

That exclusive jurisdiction had been conferred on the federal courts by laws of Congress since 1885. The statutory provisions are currently contained in 18 U.S.C.A. § 1153.[1] It is therein provided that any Indian who commits any one of ten enumerated crimes, including murder, within Indian country "shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." See *In re Carmen*, N.D. Cal., 165 F.Supp. 942, 948, *aff'd mem. sub nom.*, *Dickson v. Carmen*, 9 Cir., 270 F.2d 809. "Indian country" as used in this statute includes the Klamath Reservation. See 18 U.S.C.A. § 1151.

[1] Section 1153 is generally known as the Ten Major Crimes Act. There has been no amendment of this statute since 1949, but in 1956 embezzlement or theft from an Indian tribal organization was made a separate offense, and now reference is sometimes made to the Eleven Major Crimes Act. 18 U.S.C.A. § 1163.

Oregon, however, asserts and the United States concedes that all federal jurisdiction to prosecute an Indian for such crimes terminated and exclusive state jurisdiction attached on August 15, 1953, with the enactment of Public Law 280, 67 Stat. 588. Section 2 of that act added section 1162 to Title 18 of the United States Code, 18 U.S.C.A. § 1162. Subsection (a) of that new section conferred jurisdiction on five states, including Oregon, over offenses committed by or against Indian on Indian reservations within the state. Oregon's jurisdiction was to extend over all Indian country in that state except the Warm Springs Reservation. It was then provided in subsection (c) of section 1162 that section 1153, under which federal jurisdiction over such prosecutions had heretofore been asserted, should not be applicable within the areas of Indian country listed in subsection (a). These subsections of section 1162 as originally enacted are quoted in the margin.[4]

---

[3]The United States is an intervener in these proceedings.

[4]"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

| "State of | Indian Country affected |
|---|---|
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State, except the Menominee Reservation |

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section." (§ 1162 was amended in 1954 See note 7, infra.)

Since the homicide here in question was committed after the enactment of Public Law 280, Oregon assumed jurisdiction to prosecute Anderson for that offense. He was indicted under ORS 163.010, which pertains to first degree murder, and convicted under ORS 163.020, which pertains to second degree murder, both of which statutes have been in effect for many years.

On this appeal it contended for appellant that under a treaty between the United States and the Klamath Indian Tribe, Anderson acquired the right to be prosecuted in the federal courts for the offense in question, which right was not abrogated by the enactment of Public Law 280.

On February 17, 1870, the United States entered into a treaty with Klamath and Modoc Tribes and the Yahooskin Band of the Snake Indians. 16 Stat. 707. In article IX of that treaty the tribes which were parties thereto agreed that they would submit to and obey all laws and regulations which the United States might prescribe for their government and conduct. Appellant argues that by reason of this and other provisions of the treaty, the United States undertook to exercise police power over the Klamath Indian Tribe, precluding any such assertion of the power by the state of Oregon.

In his briefs filed in this court, appellant, then appearing in propria persona, contended that federal jurisdiction so established could not constitutionally be transferred to Oregon until appropriate steps were taken to terminate the status of the Klamath Indian tribal unit as a quasi-sovereign entity with its own territorial juris-

diction.[5] In the argument before this court, however, appellant was represented by counsel who did not press this contention. Counsel in fact conceded that rights of this kind secured by Indian treaty may be abrogated by unilateral action of the United States Congress, without first dissolving the tribal entity.

Counsel was well advised in making this concession. The plenary power of Congress over Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by later statute. *Nicodemus v. Washington Water Power Co.*, 9 Cir., 264 F.2d 614, 617. No principle of the Constitution requires that a tribe which has enjoyed benefits under a treaty with the United States be first disbanded before such benefits may be wholly or partially withdrawn.

But counsel for appellant argues that while Indian treaties are subject to amendment or repeal by unilateral action of the United States, Public Law 280 was not intended to terminate the substantive rights acquired by the Klamath Indians under the Treaty of 1870. It is urged that the abrogation of such substantial rights acquired by Indian treaty as the right to be tried in federal court cannot be presumed or implied, but must be evidenced by clear and explicit statutory language. Such language, it is contended, is not to be found in Public Law 280.

For present purposes we will assume, as appellant urges, that the treaty with the Klamath Indian Tribe

[5] In his in propria persona presentation Anderson did not renew the contention made in the state habeas corpus proceeding and rejected by the Supreme Court of Oregon in *Anderson v. Britton*, *supra*, n.1, that apart from the Treaty of February 17, 1870, jurisdiction over offenses committed by Indians in Indian country was exclusively and inherently federal and could not constitutionally be delegated to a state.

constituted an undertaking by the United States to exercise exclusive police power over that tribe. The rights thus proclaimed thereunder are substantial.[6] An intention to alter or abrogate a substantial right created by Indian treaty is not to be lightly attributed to Congress. See *United States v. Payne*, 264 U.S. 446, 448.

In unambiguous terms, Public Law 280 withdrew federal jurisdiction over offenses committed in specified areas of Indian country by the grant of exclusive criminal jurisdiction therein of five designated states. Oregon is one of them, and "all Indian country within the state, except the Warm Springs Reservation" is placed under the state's jurisdiction.[7]

In our view, this unambiguous statutory language is not obscured because Congress in the following year enacted legislation which provided comprehensive procedures for the termination of federal supervision over the property of the Klamath Indian Tribe and its members and for the termination of federal services furnished such Indians because of their status as Indians. Act

[6] It has been held that the right to be tried in a federal court accorded an Indian by the Ten Major Crimes Act (section 1153) is not a mere procedural right and is so substantial that it may not be waived even by express agreement. *In re Carmen*, 165 F.Supp. at 950. The right to be so tried accorded not only by general statute but also by Indian treaty could not be less substantial.

[7] Examination of the legislative history of Public Law 280 indicates that the Warm Springs Reservation in Oregon and specified reservations in Minnesota (Red Lake) and Wisconsin (Menominee) were not excepted from its provisions because of any supposed legal impediment arising from an Indian treaty or any other circumstance. They were excepted because the Warm Springs, Red Lake and Menominee Tribes advised the Indian Bureau that they preferred to continue under the preexisting arrangement. 1953 U. S. Code Cong. and Adm. News, 2412-13. When the Menominee Indian Tribe in Wisconsin later changed its position and welcomed a transfer of criminal jurisdiction to the state of Wisconsin, an act was passed accomplishing this change without affecting the tribe's status as a quasi-sovereign entity. Act of Aug. 24, 1954, 68 Stat. 795. See the legislative history of this act, 1954 U. S. Code Cong. & Ad. News 3171.

of August 13, 1954, 68 Stat. 718, 25 U.S.C.A. §§ 564-64w-1.

The 1954 enactment dealt with the relationship between the Klamath Indian Tribe and its members and the United States as the relationship then existed. But by then, pursuant to Public Law 280, any treaty right these Indians may have had to be tried in federal court had already been terminated. The relationship which still existed, however, required the continuation of certain other federal services and precluded the immediate application of the general civil law of Oregon. These services are to be terminated and these state laws are to be made applicable when the provisions of the Klamath Indian tribe termination act have been fully carried out.

It is further argued that Congress did not intend federal jurisdiction to expire with respect to criminal offenses committed in Oregon Indian country until Oregon by affirmative legislative action bound itself to assume such jurisdiction. No such legislation has been enacted in Oregon since Public Law 280 was passed.

The state legislation which, according to appellant, Congress required before federal jurisdiction would be released is the kind of legislation referred to in section 7 of Public Law 280, quoted in the margin.[*] But that section operates with respect to "any other State" not having jurisdiction as provided in the act. The statutory

[*] "Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

language refers to states other than Oregon and the four other states, upon which five states the act operates, under the language of section 2(a), to confer jurisdiction as of the date of enactment excepting specified areas within three of those states as noted.[9]

But it is further argued that even if Congress did not intend to subject Oregon to the requirements of section 7 of Public Law 280, it should have done so because no legislation then existed in Oregon whereby that state obligated and bound itself to assume the criminal jurisdiction the United States desired to release. This in effect is an argument not that Public Law 280 has been misconstrued by the courts of Oregon and by the district court, but that it is invalid because it leaves an hiatus in so far as criminal jurisdiction over the Indian country of Oregon is concerned.

In pressing this argument appellant urges that prior to the time Oregon became a territory, it did not purport to have or attempt to exercise criminal jurisdiction over offenses committed by Indians.[10] Hence, it is asserted, Oregon may not now exercise such jurisdiciton without first enacting affirmative legislation of the kind contemplated by section 7 of Public Law 280

[9]The intent of Congress respecting section 2(a) and the purpose of section 7 were stated in House Report 848, 83 Cong., 1st Sess. 1953. That latter purpose was said to be to give the consent of the United States to states then having laws expressly disclaiming jurisdiction to acquire jurisdiction by amending or repealing such disclaimer laws. V.2, 1953 U. S. Code Cong. & Ad. News 2409, 2412-13.

[10]This same contention was advanced in the state habeas corpus proceeding but in support of the proposition that the power to define and punish crimes committed by Indians on Oregon Indian reservations is exclusively and inherently federal and cannot constitutionally be delegated to Oregon. That proposition, which was rejected by the Supreme Court of Oregon, has not been renewed on this appeal.

Whether the courts of Oregon upon the [illegible] ment of federal jurisdiction in the [illegible] jurisdiction under then existing state law to try Indians for such offenses is a state question. The courts of Oregon have decided that question having held in *Walters v. Ickes*, 212 Ore. 1, 15-20, 318 P.2d 291, 297-98, that no implementing state legislation was needed. That determination is binding upon us. 28 U.S.C.A. [illegible]; *Trust Co. v. Pennsylvania R.R.*, 7 Cir., 163 F.2d 940, 942; *Manning v. Ketcham*, 6 Cir., 58 F.2d 945, 951.

We further agree with the state court's [illegible] the question of the power of Congress to retain jurisdiction in favor of the states. The power over Indians was deemed not so inherently or exclusively [illegible] apply beyond the extent to which the [illegible] has preempted the field, and the federal government could thus withdraw from the field and turn the subject matter back to the states when it chose to do so.

In appellant's in propria persona brief [illegible] basic contentions discussed above are developed along somewhat different lines, and additional [illegible] advanced which were not presented in the trial court. These variant and additional [illegible] examined and in our opinion are [illegible]

Affirmed.

(Endorsed) Opinion Filed July 7, [illegible]

In reaching this conclusion the Oregon Supreme Court relied upon OKS 131.210, adopted in 1864, which provides:

"Every person, whether an inhabitant of this state or any other state, territory or country, is liable to punishment by the laws of this state for a crime committed by him in this state, in all cases where such crime is by law cognizable exclusively in the courts of the United States."

With the passage of Public Law [illegible] murder by an Indian within a designated Indian country within the state was no longer [illegible] exclusively in the courts of the United States.

## APPENDIX B

## TREATIES

Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians: Concluded October 14, 1864; Ratification advised, with Amendments July 2, 1866; Amendments assented to, December 10, 1869. Proclaimed, February 17, 1870.

ULYSSES S. GRANT
President of the United States of America

To All and Singular to Whom These Presents Shall Come, GREETINGS:

Whereas a treaty was made and concluded at Klamath lake, in the State of Oregon, on the fourteenth day of October in the year of our Lord one thousand eight hundred and sixty-four, by and between J. W. Perit Huntington and William Logan, commissioners on the part of the United States, and La-Lake, Chil-o-que-nas, and other chiefs and headmen of the Klamath tribe of Indians; Schon-chin, Stak-it-ut, and other chiefs and headmen of the Moadoc tribe of Indians, and Kile-to-ak and Sky-te-ock-et, chiefs and headmen of the Yahooskin band of Snake Indians, respectively, on the part of said tribes and band of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to-wit:

Articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the fourteenth day of October, A D. one thousand eight hundred and sixty-four, by J. W. Perit Huntington, superintendent of Indian Affairs in Oregon, and William Logan, United States

Indian agent for Oregon, on the part of the United States and the chiefs and headmen of the Klamath and Modoc tribes, and Yahooskin band of Snake Indians, hereinafter named to-wit: La-Lake, Chil-o-quac-nas, Kellogue, Mo-ghen-kaskit, Blow, Lelu, Palmer, Jack, Que-as, Poosak-sult, Che-mult, No-ak-sum, Mooch-kat-allick, Toontuck-te, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Muk-has, Herman-koos-mani, chiefs and headmen of the Klamaths, Schon-chin, Stak-it-ut, Keint-poos, Chuck-e-i-ox, chiefs and headmen of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

ARTICLE I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of Harney lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: PROVIDED, That the following described tract, with the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians (and) held and regarded as an Indian reservation, to-wit: Beginning upon the eastern shore of the middle Klamath lake, at

the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountains, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States, guaranteed (and) that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within the limits, is hereby secured to the Indians aforesaid: PROVIDED, ALSO,

That the right of way for publ c roads and railroads across said reservation is GUARANTEED (reserved) to citizens of the United States.

ARTICLE II. In consideration of and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, to-wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, (it) being to promote the well being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

ARTICLE III. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming

implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employes.

ARTICLE IV. The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring-mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter, blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

ARTICLE V. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years for one physician, one miller, and two school-teachers.

ARTICLE VI. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article I to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limita-

tions, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and (the same shall be forever exempt from levy, sale, or forfeiture): PROVIDED, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: AND PROVIDED FURTHER, If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

ARTICLE V. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

ARTICLE VIII. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

ARTICLE IX. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly

with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

ARTICLE X. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United States may direct.

ARTICLE XI. It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

ARTICLE XII. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

J. W. PERIT HUNTINGTON, (Seal)
Supt. Indian Affairs

| | | |
|---|---|---|
| WILLIAM LOGAN, U. S. Indian Agt. | | (Seal) |
| LA-LAKE, | his x mark, | (Seal) |
| CHIL-O-QUE-NAS, | his x mark, | (Seal) |
| KELLOGUE, | his x mark, | (Seal) |
| MO-GHEN-KAS-KIT, | his x mark, | (Seal) |
| BLOW, | his x mark, | (Seal) |
| LE-LU, | his x mark | (Seal) |
| PALMER, | his x mark, | (Seal) |
| JACK, | his x mark, | (Seal) |
| QUE-ASS, | his x mark, | (Seal) |
| POO-SAK-SUIT, | his x mark, | (Seal) |
| CHE-MULT, | hsi x mark, | (Seal) |
| NO-AK-SUM, | his x mark, | (Seal) |
| MOOCH-KAT-ALLICK, | his x mark, | (Seal) |
| TOON-TUC-TEE, | his x mark, | (Seal) |
| BOSS-KI-YOU, | his x mark, | (Seal) |
| SKI-AT-TIC, | his x mark, | (Seal) |
| SHOL-LAL-LOOS, | his x mark, | (Seal) |
| TAT-TET-PAS, | his x mark, | (Seal) |
| MUK-HAS, | his x mark, | (Seal) |
| HERMAN-KUS-MAM, | his x mark, | (Seal) |
| JACKSON, | his x mark, | (Seal) |
| SCHON-CHIN, | his x mark, | (Seal) |
| STAK-IT-UT, | his x mark, | (Seal) |
| KEIT-POOS, | his x mark, | (Seal) |
| CHUCK-E-I-OX, | his x mark, | (Seal) |
| KILE-TO-AK, | his x mark, | (Seal) |
| SKY-TE-OCK ET, | his x mark, | (Seal) |

Signed in the presence of—

R. P. Earhart, Secretary.

Wm. Kelley, Capt. 1st Cav., Oregon Volunteers,
James Halloran, 2d Lieut. 1st Inf., W. T. Vols.,
William C. McKay, M.D.
his
Robert x Biddle.
mark

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did on the second day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to-wit:

## IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

July 2, 1866.

RESOLVED (two-thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the 14th day of October, 1864, by the commissioners on the part of the United States and the Klamath and Modoc tribes and Yahooskin band of Snake Indians, with the following

## AMENDMENTS

1st Article 1, paragraph 2, line 3 strike out the word "guaranteed," and insert in lieu thereof the word AND.

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the

word **RESERVED**.

Attest: J. W. FORNEY,
Secretary.

And whereas, the foregoing amendments having been fully explained and interpreted to the chiefs and headmen of the aforementioned Klamath and Moadoc tribes and Yahooskin band of Snake Indians, whose names are hereinafter signed, they did, on the tenth day of December, one thousand eight hundred and sixty-nine, give their free and voluntary assent to the said amendments, in the words and figures following, to-wit:

Whereas the Senate of the United States, in executive session, did on the second day of July, A. D. 1866, advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the Klamath and Moadoc tribes and the Yahooskin band of Snake Indians, with the following amendments:

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word AND.

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word **RESERVED**.

And whereas the foregoing amendments have been fully interpreted and explained to the undersigned chiefs and headmen of the aforesaid Klamath and Moadoc tribes and Yahooskin band of Snake Indians, we do hereby agree and assent to the same.

Done at Klamath Agency, Oregon, on this tenth day of December, A. D. 1869.

In witness of which, the several parties named in the said treaty have hereunto set their hands and seals, at the place and date above written.

A. B. MEACHAM, (Seal)
Supt. Ind. Affairs.
O. C. KNAPP, (Seal)
U. S. Ind. Agent.

| | | |
|---|---|---|
| ALLAN DAVIE, signed as BOSS KIYOU, | his x mark. | (Seal) |
| LE-LAKE, | his x mark. | (Seal) |
| CHIL-O-QUE-NOS, | his x mark. | (Seal) |
| MO-GHEN-KAS-KIT, | his x mark. | (Seal) |
| BLOW, | his x mark. | (Seal) |
| LO-LU, | his x mark. | (Seal) |
| PALMER, | his x mark. | (Seal) |
| JACK, | his x mark. | (Seal) |
| QUE-ALL, | his x mark. | (Seal) |
| POO-SAK, | his x mark. | (Seal) |
| CHE-MULT, | his x mark. | (Seal) |
| NO-AK-SUM, | his x mark. | (Seal) |
| MOOCH-KAT-ALLICK, | his x mark. | (Seal) |
| TOON-TUC-TE, | his x mark. | (Seal) |
| SHOL-LAL-LOOS, | his x mark. | (Seal) |
| TAT-TET-PO, | his x mark. | (Seal) |
| MUK-HAS, | his x mark. | (Seal) |
| HERMAN-KUS-MAM, | his x mark. | (Seal) |
| JACKSON, | his x mark. | (Seal) |
| SCHON-CHIN, | his x mark. | (Seal) |
| KILE-TO-AK, | his x mark. | (Seal) |
| STAK-IT-UT, | his x mark. | (Seal) |
| KEINT-POOS, | his x mark. | (Seal) |

Signed in the presence of—

Wm. C. McKay, Secretary.

J. D. Applegate.

Jno. Meacham.

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the second of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty, with the amendments as aforesaid.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

(SEAL) Done at the city of Washington this seventeenth day of February, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

By the President: U. S. GRANT.

HAMILTON FISH,

Secretary of State.

## APPENDIX C

Public Law 280—83d Congress
Chapter 505—1st Session
H. R. 1063

### AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that

such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of Indian country affected

California—All Indian country within the State

Minnesota—All Indian country within the State, except the Red Lake Reservation

Nebraska—All Indian country within the State

Oregon—All Indian country within the State, except the Warm Springs Reservation

Wisconsin—All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States, or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto, or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has such jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of — Indian country affected

California—All Indian country within the State

Minnesota—All Indian country within the State, except the Red Lake Reservation

Nebraska—All Indian country within the State

Oregon—All Indian country within the State, except the Warm Springs Resrevation

Wisconsin—All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or

existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: PROVIDED, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State Constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

## APPENDIX D

JAMES QUINTEN ANDERSON, Petitioner,

v.

C. T. GLADDEN, Warden, Oregon State Penitentiary, Respondent.

Civ. No. 60-33.

United States District Court

D. Oregon.

Oct. 13, 1960.

Habeas corpus proceeding brought by enrolled member of Klamath Tribe of Indians on basis that since he resided on Klamath Indian Rservation and murder of

which he was convicted had been committed within boundaries of Indian reservation, state of Oregon had no jurisdiction. The District Court, Kilkenny, J., held that state had full jurisdiction over crime.

Petition for issuance of writ of habeas corpus denied.

Edward L. Clark, jr., Salem, Or., Philip A. Levy, Portland, Or., for petitioner.

Robert Y. Thornton, Atty. Gen. of Oregon, Robert G. Danielson, Asst. Atty. Gen., for respondents.

C. E. Luckey, U. S. Atty., Portland, Or., for intervenor.

KILKENNY, District Judge.

This cause is before the Court on petitioner's amended petition for a writ of habeas corpus and on respondent's motion to dismiss such amended petition.

Petitioner was found guilty of the crime of murder in the second degree by a jury verdict returned on the 25th day of February, 1955, in the Circuit Court of the State of Oregon for Harney County, on which verdict petitioner was sentenced to life imprisonment in the Oregon State Penitentiary on the 1st day of May, 1955. The victim was a white man.

Petitioner is of Indian blood and at all times was, and is an enrolled member of the Klamath tribe of Indians and resided on the Klamath Indian Reservation in Klamath County, Oregon. The crime of which the petitioner was convicted was committed within the boundaries of said Indian Reservation.

Petitioner asserts that his imprisonment is violative of his rights and privileges in the following particulars:

A. The government of the United States has exclusive jurisdiction over crimes committed by Indians within Indian country.

B. Congress could not legally delegate jurisdiction over crimes committed by Indians within Indian country to the state of Oregon.

C. The state of Oregon could not legally exercise jurisdiction over crimes committed by Indians within Indian country.

D. The state of Oregon failed to take any steps to accept the jurisdiction purportedly conferred upon it by Congress over crimes committed by Indians within Indian country.

E. In any event, Congress could not legally delegate and the state of Oregon could not properly accept jurisdiction over such crimes until the termination of the Klamath Indian Reservation had taken place.

Petitioner charges that his other remedies have been exhausted by reason of the following:

1. His appeal from his original judgment of conviction to the Supreme Court of the State of Oregon and the affirmation by that Court of his conviction. State v. Anderson, 207 Or. 675, 698 P.2d 195, 60 A.L.R.2d 850.

2. His filing on June 13, 1956, of a petition for writ of habeas corpus against the Sheriff of Klamath County, Oregon, in which proceeding relief was denied by judgment entered on or about July 10, 1956.

3. His appeal from said judgment denying relief to

the Supreme Court of the State of Oregon, which judgment was affirmed by said Court on November 13, 1957. Anderson v. Britton, 212 Or. 1, 318 P.2d 291.

4. His petition for writ of certiorari to the Supreme Court of the United States to review the said decision of the Oregon Supreme Court, which petition was denied on May 19, 1958 (356 U.S. 962, 78 S.Ct. 999, 2 L.Ed.2d 1068).

[1, 2] I hold that petitioner has exhausted his remedies in the state court. The denial of the writ of certiorari by the United States Supreme Court is of no significance on the merits of this case. Brown v. Allen, 1953, 344 U.S. 443, 448-497, 73 S.Ct. 397, 437, 97 L.Ed 469; Graeber v. Rhay, 9 Cir., 1958, 256 F.2d 556.

The matters asserted in said habeas corpus proceedings before the Oregon courts were identical with the matters herein set forth in petitioner's amended petition. In my judgment the exhaustive and scholarly opinion of Justice Kester in Anderson v. Britton, supra, quite adequately disposes of petitioner's contentions, and under ordinary circumstances, I would be inclined to adopt that opinion as my own. However, petitioner has challenged the rationale of said opinion in many particulars and I feel he is entitled to this court's opinion on those subjects. A complete factual background may be obtained from State v. Anderson, supra, and Anderson v. Britton, supra.

Petitioner's contentions as set forth in his petition are reduced in his brief to two questions of law:

1. (a) Can Congress, while the Klamath Indian Res-

ervation continues in existence, legally delegate jurisdiction to the state of Oregon over crimes committed by Indians within that jurisdiction.

(b) Is Congress barred by the Klamath Indian treaty from delegating jurisdiction to the state of Oregon before termination of the Klamath Reservation pursuant to the provisions of 25 U.S.C.A. §§ 564-564x.

2. Assuming, *arguendo*, that Congress may legally delegate jurisdiction to the state of Oregon while the Reservation is in existence, is such a delegation self-executing, or does it require an affirmative acceptance by the state of Oregon.

The problem cannot be solved, without recourse to the source of power of the federal government.

[3-5] The federal union has only those powers expressly conferred on it and those reasonably implied from powers granted, while each state has all governmental powers except such as the people, by the Constitution, have conferred on the United States, denied to the state or reserved to themselves. United States v. Butler, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477; Perez v. Brownell, 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603; Knapp v. Schweitzer, 357 U.S. 371, 78 S.Ct. 1302, 2 L.Ed.2d 1393. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity with the provisions of the Constitution. Healy v. Ratta, 292 U.S. 263, 54 S.Ct. 700, 78 L.Ed. 1248; Kline v. Burke Construction Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226; Navarro v. International Terminal Co., 358 U.S. 354, 79

S.Ct. 468, 3 L.Ed.2d 368. In the state of Oregon the common law of England was adopted as it existed, modified and amended by the English statutes passed prior to the Revolution. Peery v. Fletcher, 93 Or. 43, 182 P. 143; United States Fidelity & Guaranty Co. v. Bramwell, 108 Or. 261, 217 P. 332, 32 A.L.R. 329; State v. Black, 193 Or. 295, 236 P.2d 326. Murder was a crime at common law. 1 Wharton, Criminal Law, 12th ed., p. 624, § 418. There are no common-law crimes against the United States. Donnelley v. United States, 276 U.S. 505, 511, 48 S.Ct. 400, 72 L.Ed. 676; United States v. Eaton, 144 U.S. 677, 12 S.Ct. 764, 36 L.Ed. 591.

[6] When the Colonies achieved their independence, each one took the prerogatives which had belonged to the Crown and when the national Constitution was adopted, certain of those prerogatives were imparted to the new government as an incidence of the sovereignty thus created. United States v. Thompson, 98 U.S. 486, 25 L.Ed. 194. The prerogatives of the Crown, which devolved upon the people of the states when the states declared their independence, remained with them, except insofar as they have delegated a portion thereof to the federal government. The state, as the sovereign, is in parens patriae. Fontain v. Ravenel, 17 How. 369, 58 U.S. 369, 15 L.Ed. 80. The successful termination of the War of Independence placed on the people of the thirteen original states the duties as well as the powers which formerly vested in the British Crown. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 17 U.S. 518, 4 L.Ed. 629. Such powers and duties were in the people of the individual states from the Declaration of Independence to the enactment of the

Constitution. McIlvaine v. Coxe's Lessee, 4 Cranch 209, 8 U.S. 209, 2 L.Ed. 598.

[7] Even if the Provisional government of Oregon was "de facto" only, it was clothed, while it existed, with the same rights, duties and powers as a govrenment "de jure." Lehigh Valley R. Co. v. State of Russia, 2 Cir., 1927, 21 F.2d 396, certiorari denied 275 U.S. 571, 48 S.Ct. 159, 72 L.Ed. 432; Thorington v. Smith, 8 Wall. 1, 75 U.S. 1, 19 L.Ed. 361. The jurisdiction of a nation (Oregon) within its own territory is exclusive and absolute and is susceptible to no limitation not imposed by itself. The Exchange, 7 Cranch 116, 11 U.S. 116, 3 L.Ed. 287; Church v. Hubbart, 2 Cranch 187, 6 U.S. 187, 2 L.Ed. 249. Therefore, the jurisdiction of the courts of the Provisional government of Oregon was exclusive and absolute until that government was succeeded by the government of the Territory of Oregon and the government of the United States.

[8] From the foregoing it is clear that whatever power the Congress has over Indians must be found in the Constitution and those powers must be originally derived from the states.

Prior to June 30, 1834, crimes committed by Indians against white persons and by white persons against Indians were specifically enumerated and defined and those by Indians against each other were left to be dealt with by each tribe for itself according to its local customs. Act of May 19, 1796 (1 Stat. 469, c. 30); Act of March 30, 1802 (2 Stat. 139, c. 13). On June 30, 1834, the Congress enacted what is commnoly known as the Indian Intercourse Act (4 Stat. 729, 733, c. 161). The provisions now

contained, with slight modifications, in 25 U.S.C.A. §§ 217 and 218, were contained in § 25 of said Indian Intercourse Act. These sections read:

> § 217. "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the Distict of Columbia, shall extend to the Indian country."
>
> § 218. "The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian counrty who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Legislation similar to the foregoing was enacted by Congress on February 18, 1875 (18 Stat. 318), now 18 U.S.C.A. § 1152. Both laws exclude crimes committed by one Indian against the person or property of another Indian and any Indian committing an offense in the Indian country who has been punished by the local law of the tribe and such cases which, by treaty, were secured to the exclusive jurisdiction of the Indian tribes. It was not until March 3, 1885 (23 Stat. 385), now 18 U.S.C.A. § 1153, that the Congress extended the jurisdiction of federal courts to crimes committed by one Indian against the person or property of another Indian, originally as to seven major crimes, now increased to eleven. It is significant that as early as 1796 the Congress was legislating with reference to crimes committed by Indians against

white persons and white persons against Indians. Even at that early date no one seemed to challenge the federal government's right and power under the Constitution to control and prosecute crimes by Indians with the sole exception of a crime by one Indian against another. Of course, this power must have been derived from the thirteen original states through the Constitution. Originally, this power must have been lodged in the states and, as a complete and independent sovereign prior to the adoption of the Constitution, each state must necessarily have had the right to make its criminal code apply to Indians. When each original state adopted the Constitution, it surrendered such right, to the extent of the use of that right by Congress.

Chief Justice Marshall, in one of his brilliant opinions, clearly outlines the source of federal power over Indians and Indian country in Worcester v. State of Georgia, 6 Pet. 515, 557, 8 L.Ed. 483. There, after tracing the original power to the crown of England, he finds the same lodged in the confederation of states, and says:

> "Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the states, respectively, unless a state be actually invaded, 'or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted.' *This instrument also gave the United States in congress assembled the sole and exclusive right of* 'regulating the trade and managing all the affairs with the Indians, not members of any of the states; provided,

that the legislative power of any state within its own limits be not infringed or violated."

"* * * The correct exposition of this article is rendered unnecessary by the *adoption of our existing constitution. That instrument confers on congress* the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. *These powers comprehend all that is required for the regulation of our intercourse with the Indians.* They are not limited by any restrictions on their free actions: the shackles imposed on this power, in the confederation, are discarded."

This is a direct holding that the power of the federal government over Indians and Indian affairs is conferred on Congress by the Constitution of the United States. The source of that power is the states.

The statement in United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 1114, 30 L.Ed. 228, that the power of the federal government over Indians must exist in the federal government "because it never has existed anywhere else", is, in my opinion, fundamentally unsound. In any event, the decision in Kagama must be limited to the factual situation before the court at that time. Bramwell v. United States Fidelity & Guaranty Co., 1926, 269 U.S. 483, 46 S.Ct. 176, 70 L.Ed. 368, affirming 9 Cir., 1924, 299 F. 705; In re Marathon Foundry & Machinery Co., 7 Cir., 1956, 239 F.2d 122; Metropolitan Casualty Co. of New York v. Colthurst, 9 Cir., 1930, 36 F.2d 559.

The crime involved in Kagama was the murder of an Indian by two other Indians on an Indian Reservation. It is clear that Congress had not invaded this particular field until the said Act of March 3, 1885, now 18 U.S.C.A.

§ 1153. Certainly, that language would not be appropriate where an Indian was charged with the murder of a white man, such as here.

The Preamble of the Organic Law of the Provisional government of Oregon, passed by the legislative committee of that group on July 5, 1845, and approved by the vote of the people prior to August 5, 1845, provided:

> "We, the people of Oregon territory, for purposes of mutual protection, and to secure peace and prosperity among ourselves, agree to adopt the following laws and regulations, *until such time as the United States of America extend their jurisdiction over us*: * * *."

Article I, § 3 of this Organic Law contains the following provision with reference to Indians:

> "* * * The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars, authorized by the representatives of the people; but laws founded in justice and humanity, shall, from time to time, be made for preventing injustice being done to them, and for preserving peace and friendship with them."

Under the general grant of powers, § 6 of Article II provided, among other things:

> "* * * to regulate the intercourse of the people with the Indian tribes * * * and all powers not hereby expressly delegated, remain with the people. * * *"

Article II, § 8 provided that the judicial power of the Provisional government be vested in a supreme court and

others, with the criminal jurisdiction to be lodged in such supreme court.

The Provisional government of Oregon remained in existence until the Act of August 4, 1848 (9 Stat. 323), which established the Territorial government of Oregon. Section 17 of said Act continued in full force and effect all civil and criminal proceedings which were pending under the Provisional government of Oregon and in that manner the Congress of the United States actually recognized such Provisional government.

The Constitution of Oregon was approved by a vote of the people of the Oregon Territory on November 9, 1857. The act of Congress admitting Oregon into the Union, in which said Constitution is recognized, was approved on February 14, 1859 (11 Stat. 383). Section 4 of this Act offered certain propositions to the people of Oregon for acceptance or rejection. The legislative assembly of the state of Oregon accepted these propositions by an Act approved June 3, 1859. It is significant that neither the Oregon Constitution nor the Act of Congress admitting Oregon into the Union made reference to Indians or Indian affairs. The area embraced within the confines of the state of Oregon was formerly Oregon Territory. That Territory was carved out of the former Oregon Country which stretched from the Spanish possessions (California) on the south to the Russian possessions (Alaska) on the north.[a]

When the state of Oregon was admitted to the Union, it was admitted with all of the powers of sovereignty and

a. Treaty of June 15, 1846, 9 Stat. 869, with Great Britain established northern boundary at 49 .

jurisdiction which pertained to the *original states*. Donnelley v. United States, supra p. 271; United States v. McBratney, 104 U.S. 621, 26 L.E. 867; Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419. The organization and admission of the states to the Union included in the power of such states the control of crimes committed by white people against whites in the Indian country, in the absence of some law or treaty to the contrary. Donnelley v. United States, supra; Draper v. United States, supra; United States v. McBratney, supra.

In the light of the facts in this case, it seems entirely immaterial whether I hold that the state of Oregon had residual powers over Indians and Indian territory by reason of an inherent power in the Provisional, Territorial and State governments, or by reason of retaining, on its admission to the Union, the same powers as were inherent to the thirteen original states, from whom all power with reference to Indians and Indian territory was lodged in the United States Constitution.

The Whitman Massacre occurred in Oregon Country under the Provisional government on the 29th day of November, 1847. When Oregon Territory was established by Act of Congress on August 14, 1848, it was assigned the prosecution of all criminal proceedings which were pending under the Provisional government.[1] The crimes committed by the Indians involved in said Massacre were committed against the said Provisional government. The Territorial government, an arm of the United States, was not created until after the commission of the crimes. Five of the Indians involved in said Massacre were indicted

1. Page 672 of this opinion.

on the 21st day of May, 1850 in the "District Court of the United States for the District of Oregon."[2] Defendants attacked the sufficiency of the indictment on jurisdictional grounds.[3] The Indians were found guilty in said court by the verdict of a jury.[4] Although the judgment sentencing the Indians to death is not available in the original record, I have it on good authority that the Indians were executed at Oregon City, in Oregon Territory, on June 3, 1850, which would be nine years prior to the admission of Oregon to the Union. Carey, History of Oregon, Vol. II, pp. 543-544. This exercise of jurisdiction was long before the first treaty between the United States and any of the Indians in the Oregon Territory. The first such treaty was signed at Champoeg, Oregon, on April 19, 1851, between the Twality band of the Calapooya tribe and the United States. Carey, History of Oregon, Vol. II, p. 550.

The phrase, "Indian Country" as used in the Act of 1834 was a technical one and appplied only to such portions of the United States as are described in the first section thereof or have since become such pursuant to an Act of Congress or treaty of the United States. Such phrase did not extend or apply to any country simply because it was owned or inhabited by Indians in whole or in part. It is clear that the Act of 1834 and subsequent legislation did not extend to the Oregon Country until June 5, 1850. United States v. Bridleman, D.C.Or., 7 F. 894. By express enactment of Congress on said date (9 Stat. 437) the Act of 1834 was extended to the Oregon

2. See Appendix A.
3. See Appendix B.
4. See Appendix C.

Territory. By that Act the Congress declared "that the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the Territory of Oregon." So, at the time of the formation of the Provisional government and until June 5, 1850, the federal legislatoin with reference to criminal jurisdiction over Indians was not applicable to the Oregon Country.

[9] The courts of Oregon, Provisional, Territorial and State, have always had jurisdiction over the crime of murder committed within its boundaries, such jurisdiction being limited only by Congressional action in Indian affairs. When Congress withdrew from this field, the impediment to state jurisdiction was removed.

[10] Petitioner was convicted of the violation of Oregon law,[5] not federal law. The state of Oregon, not the United States, created the court which tried petitioner and that court always had jurisdiction, except where that jurisdiction was limited by federal legislation. When the impediment was removed by Public Law 280, the jurisdiction of the Oregon courts was complete. An attempted acceptance of jurisdiction by the state of Oregon would be completely redundant. In re Rahrer, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.

State v. Columbia George, 39 Or. 127, 65 P. 604, and Red Hawk v. Joines, 129 Or. 620, 278 P. 572, are in full accord. I hold that such residual powers existed.

Petitioner relies on the treaty of February 17, 1870

5. ORS 163.020.

between the United States and the Klamath and Modoc tribes (16 Stat. 707). This treaty provided, among other things, as follows:

> "It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds and berries within its limits, is hereby secured to the Indians aforesaid: Provided, also, That the right of way for public roads and railroads across said reservation is guaranteed [reserved] to the citizens of the United States. * * *
>
> "The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct. * * *"

In construing the language of this treaty we must bear in mind the federal laws then in existence with reference to Indians and Indian territory. At that time the provisions of 25 U.S.C.A. §§ 217 and 218, with slight modifications, were in full force and effect. These laws gave exclusive jurisdiction to the United States over all crimes com-

mitted in any place within the sole and exclusive jurisdiction of the United States to the Indian Country, with the exception of crimes committed by one Indian against the person or property of another Indian, or by an Indian committing an offense in the Indian Country who had been punished by the local law of the tribe, or any case where, by treaty stipulation, the exclusive jurisdiction over such offense is or may be secured to the Indian tribes respectively. There is no claim here that the petitioner has been punished by any local law of the Klamath tribe, nor is there anything in the stipulation which would create exclusive jurisdiction over this crime in the Klamath tribe. On the other hand, the treaty affirmatively commits the members of the Klamath tribe to "obey all laws and regulations which the United States may prescribe for their government and conduct."

On August 15, 1953, Congress passed Public Law 280 (67 Stat. 588), [18 U.S.C.A. § 1162] which provided, among other things, as follows:

> § 1162. "(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> | State or Territory of | Indian country affected. |
> |---|---|
> | Alaska | All Indian country within the Territory. |
> | California | All Indian country within the State. |

| | |
|---|---|
| Minnesota | All Indian country within the State, except the Red Lake Reservation. |
| Nebraska | All Indian country within the State. |
| Oregon | All Indian country within the State, except the Warm Springs Reservation. |
| Wisconsin | All Indian country within the State. |

* * * * * *

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Section 6 of said Public Law 280 provided:

"Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act (adding section 1360 of this title and section 1162 of Title 18): Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." [28 U.S.C.A. § 1360 note.]

Section 7 of said Public Law 280 provided:

"The consent of the United States is hereby given to any other State not having juirsdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act (adding section 1360 of this title and section 1162

of Title 18), to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." [28 U.S.C.A. § 1360 note.]

Said law also conferred on the states jurisdiction over civil causes between Indians or to Indians who are parties to causes which would arise in the areas of Indian country. The law contained certain saving clauses with respect to Indian property and with respect to treaty rights for hunting, trapping and fishing.

On August 13, 1954, Congress passed an Act which provided for the termination of federal supervison over the Klamath Indians. 25 U.S.C.A. § 564. This was a comprehensive and very thorough plan for the termination of said supervision. Petitioner invokes the provisions of §§ 564q and 564r, which provide:

§ 564q: "(a) Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in sections 564 to 564w-1 of this title, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

"(b) Nothing in sections 564 to 564w-1 of this title shall affect the status of the members of the tribe as

citizens of the United States."

§ 564r: "Effective on the date of the proclamation provided for in section 564q of this title, all powers of the Secretary or other officer of the United States to take, review, or approve any action under the constitution and bylaws of the tribe are terminated. Any powers conferred upon the tribe by such constitution which are inconsistent with the provisions of sections 564 to 564w-1 of this title are terminated. Such termination shall not affect the power of the tribe to take any action under its constitution and bylaws that is consistent with said sections without the participation of the Secretary or other officer of the United States."

[11-13] 1. Petitioner has challenged the authority of Congress to return jurisdiction to the Oregon courts over crimes committed on the Klamath Indian Reservation while the Klamath Indian Reservation is in existence, until the termination of the Klamath Indian Reservation pursuant to the provisions of 25 U.S.C.A. I am of the opinion that Public Law 280 supersedes all previous laws on the subject and that if said Law is in conflict with the provisions of the treaty with the Klamath Indians of 1870, the provisions of the Law must prevail over the stipulations of the treaty. The plenary power of Congress over the tribal relations and lands of Indians cannot be limited by treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299; Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740. This plenary power over Indian tribes and tribal properties cannot be limited by treaties to the extent of preventing repeal or amendment of such treaties by a later statute. Nicodemus v. Washington Water Power Co., 9 Cir. 1959, 264 F.2d 614. Re-

spondent argues that Indian tribes retained substantial criminal jurisdiction. The Klamath tribe may have had that jurisdiction until Congress invaded the field. The above decisions and Kagama would uphold the power of Congress to pass such legislation. In any event, we are not here concerned with the crime of one tribe member against another, a field in which the tribe had jurisdiction, but with a crime committed by a tribe member against a white person. No case has been cited, and I believe none can be found, which holds that under existing legislation the Klamath tribe would have a right to try an Indian under such circumstances, to the exclusion of the federal courts. Congress had power and authority to pass such legislation.

In re Petition of Carmen, D.C.N.D.Cal. 1958, 165 F. Supp. 942, is not in point. The Court was discussing a crime committed prior to the effective date of Public Law 280. Likewise, the Washington cases, State v. Paul, 53 Wash.2d 789, 337 P.2d 33; Wesley v. Schneckloth, Wash., 346 P.2d 658; Application of Monroe, Wash., 346 P.2d 667, and other cases are not in point. When the state of Washington was admitted to the Union, its constitution provided that Indian lands should remain under the obsolute jurisdiction and control of Congress. Public Law 280 set up a specific procedure for states with such reservation. See § 6.

Williams v. Lee, 1958, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251, relied on by petitioner, does not support his theory. Justice Black, in his opinion, recognizes residual jurisdiction in the state over certain crimes committed on Indian Reservations. Furthermore, the opinion in that

case was concerned with the constitution of the state of Arizona and with special federal laws and treaties dealing only with the Navajo nation or tribe of Indians. The Arizona constitution contained an express disclaimer of jurisdiction over Indian lands (36 Stat. 569, § 20). The Navajo tribe has always had a system of criminal and civil courts and, at the time of the decision, was exercising a broad criminal and civil jurisdiction over outsiders against Indian defendants. The opinion recognizes Public Law 280, but calls attention to the fact that such law would require the people of the state to affirmatively accept the responsibility of enforcing such law. Arizona was not one of the states to which Congress granted outright jurisdiction, such as it granted to Oregon and other states.

Judge Solomon's opinion in Klamath & Modoc Tribes, etc., v. Maison, D.C.D.Or. 1956, 139 F Supp. 634, is not in conflict with my conclusions. The findings in that case dealt with the Indian treaty of October 14, 1864 (16 Stat. 707) between the United States and the tribes therein mentioned. The treaty reserved to the tribes certain hunting and fishing rights on the Klamath Reservation. Judge Solomon held that the tribes had the exclusive right, privilege and immunity to hunt and trap upon said Reservation without restriction or control, except such as they might impose upon themselves. He pointed out that Public Law 280 did not attempt to extend the hunting and trapping laws of the state of Oregon to the Klamath Indian Reservation. As a matter of fact, said Law expressly exempts such hunting and trapping rights.

On February 15, 1929 (45 Stat. 1185, 25 U.S.C.A. § 231) Congress surrendered to the states all jurisdiction

over Indians and Indian Reservations in the field of health and education and gave the states, through the Secretary of the Interior, complete jurisdiction in connection with enforcing sanitation and quarantine regulations and compulsory school attendance in such field.

On July 2, 1948 (62 Stat. 1224, 25 U.S.C.A. § 232) Congress surrendered to the state of New York complete jurisdiction over all crimes committed on Indian Reservations within the state of New York, reserving only to the Indians the hunting and fishing rights as guaranteed to them by any agreement, treaty or custom.

On September 13, 1950 (64 Stat. 845, 25 U.S.C.A. § 253) Congress surrendered to the state of New York complete jurisdiction in civil actions between Indians and other persons with certain exceptions which it is not necessary to mention. Clearly, Congress has been working toward the total emancipation of all Indians. When emancipation is to be granted is a matter for Congress to determine. United States v. Nice, 241 U.S. 591, 598, 36 S.Ct. 696, 60 L.Ed. 1192.

1(b). Public Law 280, the validity of which I have just upheld was passed on August 15, 1953. The Klamath Indian Termination Act was passed by Congress on August 13, 1954. If jurisdiction passed to the states, as I have held, then such jurisdiction was in the state of Oregon at the time of the passage of the Termination Act of 1954.

It is the position of the petitioner that Congress, by passage of said Klamath Termination Act, directed that the tribe should retain jurisdiction over all of its affairs,

including the persons of the Indians, until the dissolution was complete and that such Act would in substance repeal or modify Public Law 280 to that extent.

[14-18] A statute expressly defining the jurisdiction of a court will not be controlled by implication arising from the enactment of subsequent statutes. Rosencrans v. United States, 165 U.S. 257, 17 S.Ct. 302, 41 L.Ed. 708. Acts of Congress in pari materia are to be construed with reference to each other. Greenleaf v. Goodrich, 101 U.S. 278, 25 L.Ed. 845. All statutes relating to the same subject matter must be construed together and in such case both will be given effect, if possible. United States v. Babbit, 1 Black 55, 66 U.S. 55, 17 L.Ed. 94; In re Henderson's Tobacco, 11 Wall. 652, 78 U.S. 652, 20 L.Ed. 235. New enactments of a fragmentary nature on a subject covered by previous general legislation should be fitted into the existing system and given effect in conformity thereto. United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859. Congress is presumed to know its own laws and a later general statute does not overrule an earlier specific statute unless it does so clearly. United States v. Hawkins, 9 Cir., 1955, 228 F.2d 517. Repeals by implication are never favored and before the repeal of a statute will be implied, there must be an irreconcilable conflict between such statutes. United States v. Taylor, 104 U.S. 216, 26 L.Ed. 721; United States v. Scott, 3 Wall. 642, 70 U.S. 642, 18 L.Ed. 218; Davis v. Hutchinson, 9 Cir., 1929, 36 F.2d 309.

[19] Applying the foregoing rules of construction to the statutes in question, I find there is no conflict between Public Law 280 and said Klamath Termination Act. Pub-

lic Law 280 can be given full force and effect without in any way invading the rights and privileges mentioned under the Klamath Termination Act.

2. Petitioner contends that this law does not per se return jurisdiction in the Oregon courts over the crime in question.

The title to Public Law 280 reads:

> "To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian Reservations within such states, and for other purposes."

Section 2(a) of the Act names the states of California, Minnesota, Nebraska, Oregon and Wisconsin as the states to whom immediate jurisdiction is granted.

Subdivision (b) contains a proviso with reference to the protection of hunting, trapping and fishing rights and others.

Section 4(a) gives to the same states jurisdiction over civil causes of action arising between Indians or to which Indians are parties, even though the causes may arise in Indian country.

Section 6 of the Act recognizes those states which were admitted to the Union under a constitutional provision which reserved all jurisdiction over the Indians and Indian country to the United States. This section makes provision whereby those states may remove any legal impediment to the assumption of criminal and civil jurisdiction in accordance with the provisions of the Act and further provides that the provisions of the Act shall not become

effective as to such assumption of jurisdiction by any state until the people thereof have amended their constitution or statutes, as the case might be.

Section 7 of the Act gives the consent of the United States to *any other* state not having jurisdiction with respect to criminal offenses or civil causes of action.

The history of the Act discloses that separate bills granting such jurisdiction to each of said five states, similar to the bill granting jurisdiction to the state of New York, were pendng in Congress at the time of the adoption of the general act, Public Law 280, Congressional & Administrative News, 83rd Cong., 1st Sess., 1953, Vol. 2, p. 2413. Such history indicates that the state and local authorities in each of those states (California, Minnesota, Nebraska, Nevada, Oregon and Wisconsin) had indicated agreement to the proposed return of jurisdiction, with the exception of Nevada. The authorities in Nevada were not agreeable to acceptance of such jurisdiction without the aid of a federal subsidy. No doubt, Section 7 of the Act was intended to cover states such as Nevada if and when its legislature would approve the transfer by affirmative action.

There can be little doubt about the intention of Congress to transfer immediate jurisdiction of Indians and Indian country to the state of Oregon, except as to the Warm Springs Reservation. The consent required in Section 7 was never intended to apply to the states named in Section 2(a), now 18 U.S.C.A. § 1162. It is obvious from the title of the act that immediate jurisdiction was to be transferred to the state of Oregon and the other states specifically mentioned.

[20] The express mention of states with constitutional impediments in Section 6 would automatically exclude a state, such as Oregon, without such an impediment. Likewise, the consent required in Section 7 extends only to "any other state not having jurisdiction." This would automatically exclude states which were given jurisdiction, such as Oregon, under Section 2(a). The expression of one thing in a statute is to the exclusion of another under the maxim *inclusio unius est exclusio alterius*. United States v. Arredondo, 6 Pet. 691, 31 U.S. 691, 8 L.Ed. 547; Arthur v. Cumming, 91 U.S. 362, 23 L.Ed. 328; Paso Robles Mercantile Co. v. Commissioner, 9 Cir., 1929, 33 F.2d 653, certiorari denied Paso Robles Mercantile Co. v. Lucas, 280 U.S. 595, 50 S.Ct. 40, 74 L.Ed. 642.

The word "jurisdiction" as used in Section 2(a) has a well-understood judicial meaning and is presumed to be used in that sense. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; Westerlund v. Black Bear Mining Co., 8 Cir., 1913, 203 F. 599; N.L.R.B. v. Coca-Cola Bottling Co., 350 U.S. 264, 76 S.Ct. 383, 100 L.Ed. 285.

[21] If we apply the foregoing rules of construction to Public Law 280, it is conclusive that Congress intended to give immediate jurisdiction to the states specifically named under Section 2(a); otherwise, there would be no reason for specifically postponing the passing of jurisdiction to the states covered by Sections 6 and 7. The fact that certain conditions precedent must be fulfilled before the passing of jurisdiction to the states mentioned in Sections 6 and 7 demonstrates beyond question the in-

tention of Congress to pass immediate jurisdiction to those states specifically named.

[22] By this legislation Congress withdrew from the federal courts jurisdiction over crimes affecting Indians or Indian Reservations in the states specifically mentioned. No acceptance was required of those particular states. The state of Oregon had residual jurisdiction over the crime of which the petitioner has been convicted, and full jurisdiction over such crime was returned to the state on passage of Public Law 280.

[23, 24] Petitioner argues that a literal interpretation of the legislation would indicate an intention on the part of Congress to "confer jurisdiction" on the indicated states. I would agree that Congress might have no authority to actually *confer* jurisdiction on an Oregon court, if we accept the meaning of "confer" as creating new jurisdiction in such court. The Congress is presumed to know the law. United States v. Hawkins, supra. It is the duty of the courts to give coherence to what Congress has done within the bounds imposed by a fair reading of the legislation. Achilli v. United States, 353 U.S. 373, 77 S.Ct. 995, 1 L.Ed.2d 918. Ofttimes when the words of a statute are thoroughly analyzed, a word is found which might destroy the legislation. Then the guide is to be found in the *purpose* of the statute itself. If a word construed to give effect to that purpose, leads to absurd, Haggar Company v. Helvering, 308 U.S. 389, 394, 60 S.Ct. 337, 84 L.Ed. 340, or even unreasonable, United States v. American Trucking Associations, Inc., 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345, results, the word must bow to the statutory purpose. When using the word "confer" the Congress in-

tended nothing more than to divest the United States of the jurisdiction which it obtained from the states.

The petition for the issuance of a writ of habeas corpus be and the same is hereby denied.

It is so ordered.

## Appendix

### A.

United States of America

District Court of the United States of America, for the District of Oregon, County of Clackamas, SS:

As a District Court of the United States of America for the District of Oregon, begun and holden at Oregon City in said County, within and for said District, on the thirteenth day of May in the year of our Lord one thousand eight hundred and fifty.

The Jurors of the United States, within and for said District, on their oath present:

That on the twenty ninth day of November in the year of our Lord one thousand eight hundred and forty seven, at Wai-il-at-pu, in said county, the said place being then and there in the Indian country, certain Indians named Telakite, Tomahas, otherwise called the murderer, Clokomas, Isiaasheluckas and Kiamasumkin, with certain other Indians, whose names are to the Jurors unknown, with force and arms in and upon one Marcus Whitman, the said Whitman not then and there being an Indian, did make an assault, and that the said Telakite, Tomahas, otherwise called the murderer, Clokomas, Isiaasheluckas, and Klamasumkin with other Indians

whose names are unknown, certain guns, muskets and pistols, each of the same then and there being loaded and charged with gunpowder and bullets, which guns, muskets and pistols they the said Indians in their hands then and there had and held, to, against and upon the said Marcus Whitman, then and there feloniously, wilfully and of their malice aforethought did shoot and discharge, and that the said Indians, with the leaden bullets aforesaid, out of the muskets, guns and pistols aforesaid, then and there, by force of the gunpowder, shot and sent forth as aforesaid, the said Marcus Whitman, in and upon the body of him the said Marcus Whitman, then and there feloniously, wilfully and of their malice aforethought, did strike, penetrate and wound, giving to the said Marcus Whitman, then and there with the leaden bullets aforsaid, so as aforesaid shot, discharged, and sent forth out of the muskets, guns and pistols aforesaid, by the said Indians, in and upon the body of the said Marcus Whitman, several mortal wounds, of which said mortal wounds, he the said Marcus Whitman, then and there died. And so the Jurors aforesaid, upon their oath aforesaid, do say that the said Telakite, Tomahas, otherwise called the murderer, Clokomas, Isiiaasheluckas, and Kiamasumkin, with certain other Indians, whose names to the jurors aforesaid are unknown, him the said Marcus Whitman, in manner and form aforsaid, then and there feloniously, wilfully and of their malice aforethought did kill and murder, and did then and there commit the crime of wilful murder upon the body of the said Marcus Whitman, against the peace and dignity of the said United States and contrary to the form of the Statutes in such case made and provided. And

the Jurors aforsaid, upon their oath aforesaid, do further present, that certain Indians named Telakite, Tomahas, otherwise called the murderer, Clokomas, Isiaasheluckas and Kiamasumkin, with certain other Indians whose names are to the Jurors unknown, on the twenty ninth day of November in the year of our Lord one thousand Eight hundred and forty seven, at Wai-il-at-pu, in the county and district aforesaid, the said place being then and there in the Indian country, with force and arms, in and upon one Marcus Whitman, the said Whitman not being then and there an Indian, feloniously, wilfully and of their malice aforethought, did make an assault, and that the said Indians, with certain tomahawks, axes and knives which they then and there in their hands had and held, him the said Marcus Whitman, in and upon the head and neck of him the said Marcus Whitman, then and there feloniously, wilfully and of their malice aforethought, did strike, cut, stab and thrust, giving to the said Marcus Whitman, with the weapons aforseaid, then and there in and upon his head and neck several mortal wounds, of which said mortal wounds, he the said Marcus Whitman then and there died. And so the Jurors aforesaid upon their oath aforesaid do say that the said Telakite, Tomahas, otherwise called the murderer, Clokomas, Isiaasheluckas and Kiamasumkin, with certain other Indians whose names are to the Jurors unknown, him the said Marcus Whitman, in the manner and form aforesaid then and there feloniously, wilfully and of their malice aforethought did kill and murder, and did then and there commit the crime of wilful murder, upon the body of the said Marcus Whitman, against the peace and dignity of the said United

States, and contrary to the form of the Statute in such case made and provided. And the Jurors aforesaid, upon their oath aforesaid do further present, that the said Telakite, Tomahas, otherwise called the murderer, Clokomas, Isiaashéluckas and Kiamasumkin with certain other Indians whose names are to the said jurors unknown, at Wai-il-at-pu aforesaid in the county aforseaid, the said county being then and there in the Indian country, on the twenty ninth day of November in the year of our Lord one thousand Eight hundred and forty seven, in and upon the said Marcus Whitman, he not then and there being an Indian, feloniously, wilfully and of their malice aforethought, did make an assault; and him the said Marcus Whitman in some way and manner, and by some means, instruments and weapons, to the jurors aforesaid unknown did then and there feloniously, wilfully and of their malice aforethought deprive of life, so that he the said Marcus Whitman then and there died. And so the Jurors aforesaid, upon their oath aforesaid, do say that the said Indians, him the said Marcus Whitman, in the manner and by the means aforesaid to the said jurors unknown, then and there feloniously, wilfully and of their malice aforethought did kill and murder, and did then and there commit the crime of wilful murder in and upon the body of said Marcus Whitman, against the peace and dignity of the United States aforesaid, and contrary to the form of the Statute in such case made and provided.

A true bill.

F. W. Pettygrove, Foreman

Amory Holbrook U. S. Attorney for the District of Oregon

B.

| | | |
|---|---|---|
| The United States of America | ) | |
| v. | ) | District Court of the United |
| Teloquoit | ) | States of America, for the Dis- |
| Tamahas | ) | trict of Oregon, County of |
| Clokomas | ) | Clackamas |
| Isiaasheluckas | ) | |
| Kiamasumkin | ) | |

And the said Teloquoit, Tamahas, otherwise called the murderer, Clokomas, Isiaasheluckas and Kiamasumkin in their own proper persons cometh into court and having heard the Indictment read, saith that the said District Court of America, here ought not to take further cognizance of the felony in the several counts of the Indictment above specified because protesting that they are not guilty of the felony charged in said Indictment aforesaid, nevertheless the defendant Teloquoit, Tamahas, otherwise called the murderer, Clokomas, Isiaasheluckas and Kiamasumkin sayeth that at the time of the alleged commission of the so called felony, if committed, to wit, on the twenty ninth day of November, One Thousand Eight Hundred and forty seven, they were native born Indians belonging to the Cayuse Nation, whose territory lyeth west of the Summit of the Stoney or Rocky Mountains, and without the limits of the Indian Country as defined by the Congress of the United States in legislative enactments previous to the time of the alleged commission of the so called felony, if committed, and therefore not under or in anywise subject to the jurisdiction of the Courts of the United States.

And the Defendants Teloquoit, Tamahas, otherwise called the murderer, Clokomas, Isiaasheluckas, and Kiamasumkin further sayeth that, Wai-el-at-pu the place where the alleged felony is supposed to have been committed, was part and parcel of the country known as, claimed and possessed by the said Cayuse Nation, aforesaid, and subject to the laws and usages of the said Cayuse Nation of Indians they being free and independent, and of this they are ready to verify. Wherefore, the Defendant aforesaid, say, that this Court hath no jurisdiction to cause the defendants aforesaid to make a further or other answer to said Bill of indictment, for said supposed crime alleged in the bill of indictment. And the defendants aforesaid pray judgment whether they shall be held bound to further answer said indictment.

| | |
|---|---|
| Teloquoit | his x mark |
| Tamahas | his x mark |
| Clokomas | his x mark |
| Isiaasheluckas | his x mark |
| Kiamasumkin | his x mark |

C.

| | | |
|---|---|---|
| United States | ) | |
| vs. | ) | Oregon City |
| Telakite | ) | |
| Tomahas, or murderer | ) | May 24, A.D. |
| Clokamus | ) | 1850 |
| Isiaasheluckas | ) | |
| Kiamasumkin | ) | |

We as Pettit Jurors in the above case find the Defendants Telakite, Tomahas, otherwise called the murderer,

Clokamus, Isiaasheluckas and Kiamasumkin, guilty of the charge as set forth in the indictment.

Hiram Straight—Foreman
Joseph Parrot
J. T. Hunsaker
William A. Cason
Andrew Jackson
Albion Fort
Samuel Welch
Joseph Olfrey
John Dinsmore
Anson Cone
John Ellenburgh
A. B. Holcomb

(Filing Information on Reverse Side)

Verdict
U.S.
vs.
Telakite

Tomahas, the murderer
Clokomas
Isiaasheluckas
Kiamasumkin

Filed this 23rd day of May A. D. 1850
G. L. Curry, Clk
By F. S. Holland, Dpty

## APPENDIX E

James Quinton ANDERSON, Appellant,

v.

J. M. BRITTON, Respondent.

Supreme Court of Oregon.

Argued and Submitted Sept. 11, 1957.

Decided Nov. 13, 1957.

Habeas corpus proceeding against sheriff holding prisoner under an order of commitment pursuant to a conviction for second degree murder. The Circuit Court, Klamath County, David R. Vandenberg, J., dismissed the writ and applicant appealed. The Supreme Court, Kester, J., held that public law conferring jurisdiction over offenses committed by or against Indians in areas of certain Indian country, to the states, was not unconstitutional as an improper delegation of federal powers to the states, and under such public law, State of Oregon had criminal jurisdiction over first degree murder prosecution against prisoner, notwithstanding the fact that he was an Indian and that the act in question occurred in Indian country.

Affirmed.

Leonard H. Waterman, Burns, and Robert L. Welch, Lakeview, argued the cause for appellant. With them on the briefs was Herbert P. Welch, Lakeview.

Richard Beesley, Dist. Atty., Klamath Falls, argued the cause and filed a brief for respondent.

C. E. Luckey, U. S. Atty., Portland, filed a brief as amicus curiae.

KESTER, Justice.

This is a habeas corpus proceeding against the sheriff of Klamath county. The writ was issued and the sheriff made his return showing that plaintiff was held under an order of commitment pursuant to a conviction of second degree murder. Plaintiff made replication to the effect that the conviction was void because the state court was without jurisdiction; and in this connection he alleged that plaintiff is a tribal Indian, that the alleged homicide was committed, if at all, within the Klamath Indian reservation, and that the federal courts have exclusive jurisdiction over the alleged offense, notwithstanding Public Law 280 of the 83rd Congress. The trial court sustained a demurrer to the replication, plaintiff refused to plead further, the writ was dismissed, and plaintiff now appeals.

The facts with respect to the homicide are detailed in State v. Anderson, 207 Or. 675, 298 P.2d 195, wherein plaintiff's conviction was affirmed.

For present purposes, it is sufficient to note that the homicide in question was committed November 5, 1954, in Klamath county, and on November 12, 1954, plaintiff was indicted by the grand jury of Klamath county for first degree murder. He entered a plea of not guilty, the cause was transferred to Harney county for trial, and he was there convicted of murder in the second degree and sentenced to life imprisonment. The trial court was of the opinion that the Harney county jail was not a safe jail in which to keep the prisoner pending his motion for new trial and appeal, so an order was made directing that he be confined in the Klamath county jail until the appeal

was heard and decided. The conviction was affirmed by this court on May 31, 1956, and his petition for rehearing was denied June 27, 1956. The present petition for writ of habeas corpus was filed in Klamath county on June 13, 1956, at which time plaintiff was still in the Klamath county jail.

[1] We were advised by counsel at the argument that plaintiff is no longer in custody of the defendant, but was transferred to the Oregon State Penitentiary after the ruling on the demurrer to the replication in the lower court. The warden of the penitentiary is not a party to this proceeding. The question therefore arises whether the proceeding has become moot, as ordinarily it must and be against the one having physical custody of the plaintiff. See 39 C.J.S. Habeas Corpus § 77b, p. 622, cf. ORS 34.420; Fehl v. Lewis, 155 Or. 499, 505, 64 P 2d 648, White v. Gladden, Or., 303 P 2d 226.

[2] Although suggested upon argument, this question has not been briefed or argued here. We are of the opinion, however, that the function of habeas corpus cannot be defeated by a transfer of custody after a ruling in the trial court and pending appeal to this court. To hold otherwise would permit the jurisdiction of the court to be thwarted after it has once attached.

The common-law rule was that upon the return of the writ and the production of the person suing it out, the authority under which the original commitment took place was superseded, and thereafter the prisoner was in the custody of the court until the proceedings on the writ were finally determined. Barth v. Clise, 12 Wall. 400, 79 U.S.

400, 20 L.Ed. 393. See 25 Am.Jur. 245, Habeas Corpus § 148; 39 C.J.S. Habeas Corpus § 94, p. 659. The same principle seems to be embodied in ORS 34.640, which provides:

> "Custody of party pending proceedings. Until judgment is given upon the return, the party may either be committed to the custody of the sheriff of the county, or placed in such care or custody as his age and other circumstances may require."

[3] Since there is a statutory right of appeal in habeas corpus, the proceeding is not finally determined until the appeal, if taken, has been decided. See Macomber v. Alexander, 197 Or. 685, 692, 255 P.2d 164.

[4] In this case the order of the trial court dismissing the writ also remanded plaintiff to the custody of the sheriff of Klamath county. Notwithstanding his transfer to the penitentiary, for the purpose of this proceeding he remains constructively in the custody of the sheriff pending determination of the appeal. See Pomeroy v. Lappeus, 9 Or. 363, 365. Should it become necessary to reinstate the writ, the warden could be made a party defendant in this court.

The next question arises out of the fact that the matter plaintiff now seeks to raise could have been, but was not, presented in the criminal case itself. In Macomber v. State, 181 Or. 208, 218, 180 P.2d 793, 797, we said: * * *. Normally, the extraordinary remedy of habeas corpus is not available to those who neglected to appeal * * *." In Huffman v. Alexander, 197 Or. 283, 350, 251 P.2d 87, 253 P.2d 289, 298, we said: "* * * convicted persons should exhaust their remedies in the nature of an appeal

and by motion for a new trial before resorting to habeas corpus, whenever on the facts of the case, either of those procedures would provide an adequate remedy." And in Blout v. Gladden, 203 Or. 487, 280 P.2d 414, we held that habeas corpus could not be used to relitigate questions which had been decided on the appeal of the criminal case. See also Anderson ex rel. Poe v. Gladden, 205 Or. 538, 551, 288 P.2d 823, certiorari denied 350 U.S. 974, 76 S.Ct. 451, 100 L.Ed. 845; Alexander v. Gladden, 205 Or. 375, 395, 288 P.2d 219.

[5, 6] From the foregoing cases it would seem to follow that habeas corpus will not lie where an appeal was taken and the question was not raised, when if it had been raised, the remedy by appeal would have been adequate. It begs the question to say that want of jurisdiction renders the judgment absolutely void, because habeas corpus can never be used for collateral attack on a judgment unless the judgment is void. Garner v. Alexander, 167 Or. 670, 674, 120 P.2d 238, certiorari denied 316 U.S. 690, 62 S.Ct. 1281, 86 L.Ed. 1761; Huffman v. Alexander, supra, 197 Or. at pages 297, 299, 251 P.2d at pages 93, 94; Smallman v. Gladden, 206 Or. 262, 270, 291 P.2d 749.

[7] Closely allied to the foregoing rule is the doctrine that, in the absence of special circumstances, the inquiry on habeas corpus is limited to examination of facts appearing upon the face of the record, and that evidence outside the record of the principal case will not be received to impeach the judgment. The authorities on this question were recently reviewed by the Supreme Court of California in Application of Carmen, Cal., 313 P.2d 817, decided August 2, 1957.

In that case Carmen had been convicted of murder and of assault with intent to murder, committed in 1950, and upon appeal from the conviction it was suggested at the oral argument that facts might be adduced showing that Carmen and his victim were Indians, and that the crimes had been committed within Indian country, with the result that exclusive jurisdiction over the offense might be vested in the federal courts. Those facts did not appear in the record, however, and the Supreme Court of California denied an application to produce such additional evidence on appeal, and it affirmed the conviction. People v. Carmen, 36 Cal.2d 768, 228 P.2d 281; Id., Cal., 265 P.2d 900; Id., Cal.2d 342, 273 P.2d 521.

Thereafter the same court issued a writ of habeas corpus and made an order of reference. The referee reported that the petitioner and his victim were both unemancipated, tribal Indians, and that the crimes occurred on Indian allotment lands held in trust by the United States, which were not, however, part of a reservation.

Thereafter the writ was discharged, and the court declined to pass upon the effect of the referee's findings or the sufficiency of the evidence to support those findings, on the ground that:

> "* * * in the absence of exceptional circumstances, which are not present here, petitioner may not contest, in this collateral attack upon the final judgments of conviction, the trial court's determination and exercise of jurisdiction, upon the basis of new and additional facts which do not appear in the trial court record. [313 P.2d at page 818]
>
> * * * * * *
>
> "* * *. Petitioner therefore should have al-

leged and proved in the trial court any facts which he now claims might have had the effect of vesting exclusive jurisdiction in the federal courts." 313 P.2d at page 819.

Four justices concurred in the opinion of the court, and three dissenting opinions were filed, so that the various aspects of the problem were fully explored, and recent decisions of the Supreme Court of the United States were considered at length. Part of the diffeernce within the California court appears to have revolved about the question whether the case presented "exceptional circumstances" so as to take it out of the rule enunciated by the majority.

Essentially the same question was considered by this court in Huffman v. Alexander, supra, where Chief Justice Brand, speaking for the court, distinguished between two different types of attack by habeas corpus upon judgments of conviction:

> "* * *. By the first, the plaintiff expressly or by implication admits that the recitals in the record as to what was actually said and done in open court are true, but he seeks to present evidence outside of the judicial record which goes behind but does not contradict the essential recitals thereof. Illustrations of this type include cases in which a waiver of some constitutional right was induced by fraud or was the result of gross ignorance or the like. By the second method of attack the plaintiff alleges and seeks to prove that the events recited in the judicial record in fact never happened. The first method goes behind the record to invalidate it but does not directly contradict it. The second challenges the truth of the judicial recital itself." 197 Or. at page 303, 251 P.2d at page 96.

As to the first of these methods of attack, the conclusion of the court was:

> "* * * we deem it firmly established by modern decisions, both state and federal, that the recitals in the judgment of conviction and sentence, although presumed to be both true and valid, may nevertheless be attacked by evidence outside the record which tends to invalidate but not directly to contradict the judicial recital." 197 Or. at pages 313-14, 251 P.2d at page 100.

As to the second, the opinion says:

> "We hold, as a general rule, that recitals in the judicial record, showing what was said and done in the court, import absolute verity, and therefore cannot be collaterally attacked in habeas corpus." 197 Or. at page 317, 251 P.2d at page 102.

The present case is more nearly like the first of these classes, and under that rule the inquiry would be permitted, were it not for the additional fact that no reason is shown why the point could not have been raised in the criminal case and upon appeal from the judgment of conviction. In the Huffman case sentence was entered upon a plea of guilty, and there was no appeal from the judgment of conviction. Indeed it was contended that petitioner had been wrongfully deprived of his right of appeal. Therefore there was reason in the Huffman case to permit evidence of habeas corpus of alleged fraud in procuring the waiver of indictment, that would not exist in this case, where petitioner had ample opportunity to adduce at the trial any facts showing want of jurisdiction, and to present the legal effect of those facts upon appeal, but failed to do either.

[8] We gather from statements made upon the argu-

ment that counsel for plaintiff had in mind at the trial the jurisdictional question now presented, but deliberately refrained from raising it until after the decision on appeal from the conviction. Under these circumstances we would not ordinarily consider the matter upon habeas corpus. However, because of the public importance of the question (involving, as it does, a large field of law enforcement), we feel warranted in considering the case on its merits, notwithstanding plaintiff's failure to exhaust his previous remedies and his obvious gambling on the outcome of the prior case.

Plaintiff challenges the constitutionality of Public Law 280 of the 83rd Congress (67 Stat. 588), approved August 15, 1953, which enacted a new section, known as § 1162 of Title 18 United States Code. Its applicable portion provides:

> "§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country
>
> "(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the States, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the state:
>
> "State of Indian country affected
>
> * * * * * *
>
> "Oregon ..... All Indian country within the State, except the Warm Springs Reservation."

Public Law 280 also conferred on the state jurisdiction over civil causes between Indians or to which Indians

are parties which arise in the same areas of Indian country; it had certain saving clauses with respect to Indian property and with respect to treaty rights for hunting, trapping or fishing; it rendered inapplicable certain provisions of federal law dealing with Indian offenses; and it concluded with the following:

> Sec. 6. "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."
>
> Sec. 7. "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." 28 U.S.C.A. § 1360 note.

Defendant's demurrer to the replication admits that plaintiff is of Indian blood, that he was and is a duly and regularly enrolled member of the Klamath tribe of Indians, that he resided upon the Klamath Indian reservation in Klamath country, Oregon, that the Klamath tribe is a recognized tribe or community of Indians organized under a constitution and bylaws approved by the Secretary of the Interior and maintaining a tribal government,

and that the alleged homicide was committed, if at all, within the boundaries of the Klamath Indian reservation in Klamath county, Oregon.

The first degree murder statute (ORS 163.010), under which plaintiff was indicted, and the second degree murder statute (ORS 163.020), under which he was convicted, both refer to "any person" and "every person." There can be no doubt that such statutes would be applicable to plaintiff, except for the circumstance that he was an Indian and that the act occurred in Indian country. No further legislation or constitutional provision dealing with this subject has been adopted in Oregon since the enactment of Public Law 280. Therefore the question is presented whether Public Law 280 is valid, and whether it has the effect of removing the federal government from the field and of conferring jurisdiction over this subject on the courts of Oregon, without further action by the state.

At the outset we note that the validity of Public Law 280 was assumed by the California Supreme Court in Application of Carmen, supra. That case arose prior to the effective date of the Act, at a time when jurisdiction over Indian offenses in Indian counrty was clearly vested in the federal courts, but the Act (which applied to California as well as Oregon) became effective before the final decision in the case. In referring to it the California court said:

> "* * * petitioner's claims are based entirely upon federal statutes (§§ 1151, 1152, 1153, 3242, Title 18 U.S.C.A.), the effect of which has been changed since petitioner committed his offenses, by legislation giving the courts of this state unquestioned

> jurisdiction over offenses committed in 'All Indian country within the State.' § 1162, Title 18 U.S.C.A., as amended Aug. 24, 1954."

However the opinion does not indicate that the question of validity was presented in that case. We have found no case since enactment of Public Law 280 which directly passes upon its validity in the respects here concerned.[1]

Plaintiff claims that the power to define and punish crimes committed by Indians on Indian reservations is exclusively and inherently federal. Based on this premise, he then argues that the federal power cannot constitutionally be delegated to the states. He also argues that Public Law 280 is not self-executing, but requires implementing legislation by the state; and that any such legislation by the state would itself be invalid as lacking in uniformity, because under Public Law 280 the Warm Springs reservation would have to be excepted.

The latter arguments can be disposed of quickly. ORS 131.210 (adopted in 1864) provides:

> "Every person, whether an inhabitant of this state or any other state, territory or country, is liable to punishment by the laws of this state for a crime committed by him in this state, except where such crime is by law cognizable exclusively in the courts of the United States."

Prior to Public Law 280, murder by an Indian, within the Indian country was "cognizable exclusively in the courts of the United States." Title 18 U. S. Code, provides:

---

1. In Klamath & Modoc Tribes, etc., v. Maison, D.C.1956, 139 F.Supp. 634, the U. S. District Court for Oregon held that Public Law 280 did not extend the hunting and trapping laws of the state of Oregon to Indians upon the Klamath reservation. Such rights were established by the treaty of 1870, 16 Stat. 707 and were expressly reserved by Public Law 280.

§ 1152: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

§ 1153: "Any Indian who commits * * * murder * * * within the Indian country shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

§ 3242: "All Indians committing any of the following offenses, namely murders, * * * on and within the Indian country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

[9] Public Law 280 provides that "the provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section," but it does not mention § 3242. Plaintiff argues that the failure to mention § 3242 leaves it unimpaired, with the effect that the federal courts still have exclusive jurisdiction, notwithstanding Public Law 280. However, § 3242 is essentially procedural, and since plaintiff's construction would render Public Law 280 nugatory, we have no hesitation in holding that § 3242 was repealed by implication, to the extent that Public Law 280 is applicable.

[10] Hence if Public Law 280 is valid, no further legislation was required to render plaintiff subject to the state laws dealing with murder. Sections 6 and 7 of Public Law 280 were apparently intended for states whose existing constitutions and statutes were not adequate to fill the gap left by federal withdrawal, but such is not the case in Oregon. Since no implementing legislation is necessary, and the existing laws as to murder do not distinguish between Indians and others, we will not speculate as to the constitutionality of statutes not yet enacted.

The real question involves consideration of the fundamental nature of the federal power over Indian affairs. If that power is inherent solely in the federal government, to the necessary exclusion of the state, then the question of delegation may become important. But if the state has residual power over Indians and Indian territory, which is merely in suspension so long as the federal government chooses to occupy the field, then a withdrawal by the federal government does not vest any new power in the state but merely removes an impediment to the exercise of pre-existing power.

The United States Constitution contains no direct grant of power to the federal government over criminal offenses by Indians or in Indian territory. Nevertheless it has been universally recognized that the federal government has plenary power over Indian affairs, at least so long as Congress chooses to exercise it. That power has been variously thought to stem from: (1) the power to regulate commerce with the Indian tribes (Art. I, § 8, cl. 3); (2) the treaty-making power (Art. II, § 2, cl. 2) and the corollary power to implement treaties by legis-

lation: (3) the power over federal property (Art. IV, § 3, cl. 2); (4) the war powers (Art. I, § 8, cl. 11 et seq.); (5) the power to admit new states (Art. IV, § 3, cl. 1) and inferentially to prescribe the terms of such admission; and (6) the power to make expenditures for the general welfare (Art. I, § 8, cl. 1). See Cohen, Handbook of Federal Indian Law, ch. 5 (U. S. Dept. of Interior publication).

Whatever its theoretical source, the exercise of federal power has also had a practical basis. In United States v. Kagama, 118 U.S. 375, 383-385, 6 S.Ct. 1109, 1114, 30 L.Ed. 228, in sustaining the validity of the federal statute which gave the federal courts exclusive jurisdiction over crimes by one Indian against another within an Indian reservation (23 Stat., ch. 341, p. 362, § 9, p. 385, March 3, 1885, the predecessor of what is now 18 U.S.C.A. § 1153) the court made the following statement which has since been quoted many times:

> "It seems to us that this is within the competency of congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States,—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by this court, whenever the question has arisen.
>
> * * * * * *

> "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theatre of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes." (Italics in original.)

Plaintiff relies heavily on the statement in the Kagama case, supra, that "it [the power over Indians] never has existed anywhere else [than in the federal government]." That statement, however, cannot be accepted without qualification.

In Red Hawk v. Joines, 129 Or. 620, 634, 278 P. 572, 577, where this court upheld jurisdiction in the state court of a replevin action by an Indian against a white man arising out of the taking of some cattle on the Umatilla Indian reservation, the court adopted the opinion of Circuit Judge James Alger Fee, in which it was said:

> "It is a familiar principle that where Congress has the right to take over exclusive jurisdiction, and has not covered the particular subject under consideration, the power of the state courts is upheld until Congress acts. See Sioux Remedy Co. v. Cope, 235 U.S. 197, 35 S.Ct. 57, 59 L.Ed. 193; Territory of New Mexico ex rel. E. J. McLean & Co. v. Denver etc. R. Co., 203 U.S. 38, 27 S.Ct. 1, 51 L.Ed. 78; Sligh v. Kirkwood, 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835.
>
> "It does not follow because the authority of the federal government over the Indians and the Indian country is supreme, that the state and territorial government have no jurisdiction whatever over them, and over Indian Reservations. In the absence of provisions to the contrary, the lands embraced therein

occupied by Indian tribes are a part of the state territory, and subject to its jurisdiction, except so far as concern the government and protection of the Indians themselves, and for purposes relating to treaties and agreements between the United States and Indians, in which respects the jurisdiction of the United States is exclusive. Wagoner v. Evans, 170 U.S. 588, 18 S.Ct. 730, 42 L.Ed. 1159; Thomas v. Gay, 169 U.S. 264, 18 S. Ct. 340, 42 L.Ed. 740; Draper v. United States, 164 U.S. 240, 17 S. Ct. 107, 41 L.Ed. 419; Utah & Northern Ry. Co. v. Fisher, 116 U.S. 28, 6 S. Ct. 246, 29 L. Ed. 542."

The same qualification was expressed in State v. Columbia George, 39 Or. 127, 147, 65 P. 604, 610, which held that the exclusive power over Indian crimes on Indian reservations, which was vested in the federal courts by the Act of 1885, 23 Stat. 362, was not altered by the Dawes Act of 1887, 24 Stat. 388, which allotted public lands to Indians and conferred citizenship on the allottees. In the opinion Mr. Justice Wolverton stated:

> "The state courts have never had jurisdiction over the Indians within the Indian country or upon Indian reservations, *except as and in so far as the general government has relinquished the supervisory control and authority over them*." (Italics ours.)

The history of Indian affairs, particularly in recent years, has shown a decided trend toward the emancipation of the Indians, the withdrawal of federal control, and an attempt to assimilate the Indians into the community life of the various states. Some of the problems attendant upon that policy recently prompted the Oregon State Bar to appoint a special committee on the legal rights of Indians. The report of that committee in 1956 contained an excellent and concise summary of the trend, and ex-

cerpts from that report are attached to this opinion as an appendix. Further reference to the general aspects of the problem is unnecessary.

Assuming, as can be inferred from the Kagama case and similar language in other cases, that the federal power over Indian affairs (or at least the exercise of it) rests in part on considerations of necessity or expediency, because of the dependent relationship of the tribes to the United States, the need for such control naturally diminishes as the Indians progress away from their primitive state.

The determination of when the wardship status of Indians is to be terminated is a legislative or political question and not for the courts. In United States v. Nice, 241 U.S. 591, 598, 36 S.Ct. 696, 697, 60 L.Ed. 1192, which upheld the federal prohibition of liquor traffic with Indians whose land allotments were still held in trust, the court said:

> "Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial."

[11] It is clear that the power over Indians, as such, is not so inherently federal as necessarily to exclude the states, because Indians outside of "Indian country" are subject to the general criminal laws of the states. Tooisgah v. U. S., 10 Cir., 1950, 186 F.2d 93.

[12] And likewise the federal power over Indian country is not necessarily exclusive, because crimes by

non-Indians committed on Indian reservations are subject to state laws. United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869; People of State of New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S. Ct. 307, 90 L.Ed. 261.

[13] These examples illustrate that the inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has pre-empted the field. It follows therefore that the federal government may withdraw from the field and turn the subject matter back to the states, when it chooses to do so.

[14] Plaintiff dose not point to any specific clause of the constitution which he claims is violated by Public Law 280. Instead he urges that the act is invalid because there is no constitutional authority to sustain it. In this connection he says that the federal power over the Klamath Indians and the Klamath reservation is based solely upon the Treaty of February 17, 1870, between the United States and the "Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians" (16 Stat. 707).

By that treaty the tribes ceded to the United States all their claim to certain described lands, and in turn the United States set aside a portion of those lands as an Indian reservation. Among other provisions, Article IX of the treaty provided:

> "The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not com-

> municate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct."

Plaintiff claims that the tribe agreed to submit only to the laws and regulations of the United States, and not to those of the state of Oregon; and that any powers not surrendered to the United States remained in the tribe, so that upon relinquishment by the federal government, the power reverts to the tribe itself. Plaintiff's argument negates any authority in either state or federal government, except as derived from the treaty.

It is true that various Indian tribes were for a time treated as having some aspects of sovereignty, that they were dealt with by means of treaties until the Act of March 3, 1871 (16 Stat. 566, 25 U.S.C.A. § 71, see Appendix, infra), and that treaties between them and the United States have been held supreior to state laws. E.g. Worcester v. Georgia, 6 Pet. 515, 31 U.S. 350, 8 L.Ed. 483.

But it has also been held that the power of congress over Indian affairs is plenary, that it cannot be limited by treaty, and that an Indian treaty may be abrogated by congress, so long as individual rights acquired under the treaty are not destroyed. Lone Wolf v. Hitchock, 187 U.S. 553, 566, 23 S.Ct. 216, 47 L.Ed. 299; Choate v. Trapp, 224 U.S. 665, 671, 32 S.Ct. 565, 567, 56 L.Ed. 941. In the latter case the Supreme Court said:

> "* * * the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as

dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States."

It follows that the Treaty of 1870 did not bind the United States to maintain its police power perpetually over the tribe, to the exclusion of the state. On the contrary, the treaty (so far as is here concerned) was on a parity with the federal criminal laws relating to Indians on Indian reservations, and either could be modified by subsequent enactment. The treaty was not the source of federal power, but it was merely a means by which the existing, but dormant, federal power was exercised. Upon its exercise the rights of the state were suspended until such time as the federal pre-emption should be relinquished, and the relinquishment could be accomplished by congression act. What then, were the rights of the state prior to the Treaty of 1870?

By the act admitting Oregon as a state (February 14, 1859, 11 Stat. 383) Oregon was received into the Union "on an equal footing with the other States in all respects," and there was no exclusion of any jurisdiction over either Indians or Indian territory. The operation of federal statutes then, as now, being limited to "Indian country" (Act of March 27, 1854, 10 Stat. 270, ch. 26, § 3) and there being no "Indian country" defined as such with respect to the Klamaths prior to 1870, it follows that between 1859 and 1870 the Klamaths, and the area later to become the Klamath reservation, were subject to state jurisdiction.

Therefore, if Public Law 280 in fact conflicts with the

Treaty of 1870 (which it is unnecessary to decide), the effect of the statute was to abrogate the treaty. Plaintiff has no such vested right in being tried by the federal, rather than the state courts, as would entitle him to complain of the abrogation. And the withdrawal of federal control leaves the subject in the hands of the state, where it was prior to the treaty.

[15] We hold that Public Law 280 of the 83rd Congress is not unconstitutional, that under it the state of Oregon had criminal jurisdiction over this offense, and the demurrer to plaintiff's replication was properly sustained.

Affirmed.

## APPENDIX

Report of Oregon State Bar Committee on Legal Rights of Indians, 1956.

"1. Preliminary comment

"The legal status of Indians in the United States is unique. In earlier years, they were treated as neither citizens nor aliens. Nor were their tribes regarded as 'nations,' as that term is used in international law. Their relationship, either as individuals or as tribes, to the Government of the United States could hardly be defined in conventional legal terms. As observed by Chief Justice Marshall some 125 years ago, 'the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.' (Cherokee Nation v. Georgia, 5 Pet. 1, 17 [30 U.S. 1, 8 L.Ed. 25])

"Prior to 1871, the civil rights of Indians were gov-

erned largely by treaties made by the United States with the various Indian tribes. But by an act passed March 3, 1871 [25 U.S.C.A. § 71], Congress terminated the prior method of dealing with the Indians through treaties and provided that:

> " 'hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.' (16 Stat. 566)

Thereafter, the United States governed the Indians directly, by the exercise of its legislative powers, rather than by contract, except that the obligations of treaties made prior to March 3, 1871 were recognized as binding. However, for practical reasons in a few instances, contracts were made with tribes in certain areas. Nevertheless, the 1871 Act marked the first major change in the attitude of the United States toward the Indians.

"2. Citizenship

"The second major change in governmental attitude toward Indians, which came about more slowly, related to the status of Indians as citizens. In 1884, the Supreme Court held that an Indian was not, merely by reason of birth within the United States, a citizen of the United States within the meaning of the 14th Amendment. (Elk v. Wilkins, 112 U.S. 94 [5 S.Ct. 41, 28 L.Ed. 643])

"But subsequently, by a series of acts beginning in 1887, Congress extended citizenship to certain Indians who had 'adopted the habits of civilized life' (24 Stat. 390), to 'every Indian in Indian Territory' (31 Stat. 1447),

to all Indians who had served in the armed forces of the United States in World War 1 (41 Stat. 350), to 'all members of the Osage Tribe of Indians' (41 Stat. 1250), and finally in 1924 to 'all non-citizen Indians born within the territorial limits of the United States.' (43 Stat. 253)

"3. Property rights

"The United States always has exercised some control over the property rights of Indians. The constitutional authority for the exercise of that power has been sustained on various practical grounds. In 1942, the Supreme Court stated it in this way:

> " 'From almost the beginning, the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. * * * This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.' (Board [of County Com'rs of Creek County] v. Seber, 318 U.S. 705, 715 [63 S.Ct. 920, 87 L.Ed. 1094])

"And the court in that case, following earlier decisions along the same line, held that 'the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of

the federal government.' ([318 U.S. at] p[age] 718 [63 S.Ct. at page 927]) The contemplated surrender of that control created the problem which prompted the appointment of this committee.

"D. Termination of Federal control

"While Congress may not abdicate its constitutional power 'to regulate commerce * * * with the Indian tribes' (Art. I, sec. 8), it is settled that Congress may terminate the guardianship of the United States over the individual Indian and completely emancipate him from all Federal control not exercised over other citizens. For some fifity years, Congress has been moving gradually toward that end, dealing separately with particular tribes, one at a time.

"In 1954, Congress passed four separate acts relating to Indians of four separate tribes. One act dealt with the Menominee Tribe in Wisconsin (68 Stat. 250), another with the Ute Tribe in Utah (68 Stat. 868), a third with the Klamath Tribe in Oregon (68 Stat. 718), and the fourth with the Western Oregon tribes (68 Stat. 724). And there are now pending before the 84th Congress bills for similar acts relating to the Wyandotte Tribe (S. 3970) [70 Stat. 893], the Peoria Tribe (S. 3968 and H.R. 11672) [70 Stat. 937], and the Ottawa Tribe (S. 3969 and H.R. 11670 [70 Stat. 963].

"In substance, the 1954 Acts and the pending bills follow the same general pattern. Therefore, specific reference will be made only to the act relating to the Klamath Indians. It stated that its purpose was to terminate 'Federal supervision over the trust and restricted property

of the Klamath Tribe of Indians' and to terminate 'Federal services furnished such Indians because of their status as Indians.' The body of the act, which is too long even to summarize here, sets forth the various steps to be taken to accomplish that purpose.

"The provisions with which we are presently concerned (1) give to each member of the tribe the right to elect 'to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate in the tribal management plan' outlined in the act, (2) direct the Secretary of the Interior, when the termination *plain* is completed, to issue a 'proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has [been] terminated,' and (3) declare that thereafter 'all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.' The act declared the intention of Congress to accomplish the complete termination of Federal control 'at the earliest practicable time and in no event later than four years from the date of this Act.' "

## APPENDIX F

Official Election for
KLAMATH MANAGEMENT SPECIALIST

139 South 7th Street
Klamath Falls, Oregon

This form must be signed in the presence of a notary public.

KLAMATH TRIBE OF INDIANS

Form No. 1: Election Form (Adults)

1. Klamath member's name: Anderson, James Quentin
2. Final Roll Number: 17
3. I reside at 2605 State Street, in the State of Oregon, Salem, and am a member of the Klamath Tribe of Indians, and make the following election:

☐ A. I elect to remain in the tribe and have my share of tribal assets placed under a management plan substantially in the form of the plan dated Feb., 1958, of which I have received a summary, which is satisfactory as to form and content.

☒ B. I elect to withdraw from the tribe and have my share of tribal assets converted into cash.

(Make an X in the box in front of your choice)

Signed. James Quentin Anderson
(Name of Klamath member making choice)

Notice: Members must have the following part of this form completed by a notary public.

Subscribed and sworn to before me this 13 day of March, 1958.

John R. Akin,
Notary Public
My commission expires October 31, 1959

(SEAL)

This form, signed by you AND A NOTARY PUBLIC, must be returned to 139 S. 7th Street, Klamath Falls, Oregon. You must mail the completed form by APR 21, 1958. If you do not, you will remain in the tribe and your share of tribal assets will be placed under the final plan of Management.

Office-Supreme Court, U.S.
FILED
DEC 2 1961
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

Case No. 584

JAMES QUENTIN ANDERSON, Petitioner,

v.

C. T. GLADDEN, Warden, Oregon State Penitentiary, Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT Y. THORNTON
Attorney General of Oregon

HAROLD W. ADAMS
Assistant Attorney General
Attorneys for Respondent
Supreme Court Building
Salem, Oregon

JAMES QUENTIN ANDERSON
2605 State Street
Salem, Oregon
In propria persona

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## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

### I

### SINGLE QUESTION PRESENTED

Inherently, and as an attribute of sovereignty, the State of Oregon had and has criminal jurisdiction over James Quentin Anderson. There is therefore no occasion for further determination of this fact by the federal courts.

### II

### STATEMENT OF THE CASE

On the issue raised here, petitioner's statement of the case, citations of the opinions below and statutes involved are considered to be sufficient.

## III

## ARGUMENT

**The issues presented in the petition for writ of certiorari are not ones falling within the ambit of 21 U.S.C. 2241 nor ones entailing the considerations outlined in Rule 19.**

The position of the State of Oregon is stated fully in the case of *Anderson v. Britton*, 212 Or. 1, 318 P. (2d) 291. Therein, the Oregon Supreme Court stated at p. 20:

> "* * * the inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has preempted the field. It follows therefore that the federal government may withdraw from the field, and turn the subject matter back to the states, when it chooses to do so."

That this coexistence of sovereign jurisdiction has always existed is demonstrated by the concurring opinion of Justice M'Lean, in the case of *Worcester v. The State of Georgia*, 6 Pet. 512, 8 L. Ed. 483, at page 592:

> "* * * But, if a contingency shall occur which shall render the Indians who reside in a State incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a State government to extend to them the aegis of its laws. Under such circumstances, the agency of the general government, of necessity, must cease.
>
> "But, if it shall be the policy of the government to withdraw its protection from the Indians who reside within the limits of the respective States, and who not only claim the right of self-government

but have uniformly exercised it; the laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. * * *"

And, in a quotation from the case of *Guttman v. United States*, 85 U.S. 816, 13 Wall 84, 21 L. Ed. 816, the following statement appears:

"* * * The Indian tribes and individuals are subject to the laws of the United States, and of the states in which they are located. *The Cherokee Tobacco.* 11 Wall 619, 20 L. ed. 228. * * *"

The validity of these prescient expressions is demonstrated fully in the case of *Matter of Heff*, 197 U.S. 488, 25 S. Ct. 506, 49 L. Ed. 848, at page 499. Justice Brewer, delivering the opinion of the court stated:

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be

made clear by its legislation, but when that purpose is made clear the question is at an end."

The Ninth Circuit Court of Appeals states in its opinion in *Anderson v. Gladden*, No. 17,188, July 7, 1961 (Appendix A, Petition, at p. 6):

"In unambiguous terms, Public Law 280 withdrew federal jurisdiction over offenses committed in specified areas of Indian country by the grant of exclusive criminal jurisdiction therein of five designated states. Oregon is one of them, and 'all Indian country within the state, except the Warm Springs Reservation' is placed under the state's jurisdiction.

"In our view, this unambiguous statutory language is not obscured because Congress in the following year enacted legislation which provided comprehensive procedures for the termination of federal supervision over the property of the Klamath Indian Tribe and its members and for the termination of federal services furnished such Indians because of their status as Indians. Act of August 13, 1954, 68 Stat. 718, 25 U.S.C.A. §§ 564-64w-1."

The sovereignty of a state or territory has, wherever not in conflict with the exercise of a paramount power of the Federal Government, been the basis of the exercise of criminal jurisdiction over Indians. Thus, in *United States v. Seveloff*, 2 Sawyer 311, Judge Deady pointed out:

"In 1853 the Supreme Court of the Territory of Oregon in *United States v. Tom*, 1 Or. 27, held that the Act of 1834 was not in force to the westward of the Rocky Mountains until specially extended over the Territory of Oregon by the Act of 1850."

In so holding, the territorial court overruled a motion to quash the indictment and allowed the prosecution in territorial court, of "Tom, an Indian" for selling liquor to other Indians, *United States v. Tom*, 1 Or. 27.

Judge Deady continuously recognized that the State would have competent jurisdiction save for the interposition of paramount federal authority. This is perhaps best demonstrated by the case of *United States v. Barnhart*, 10 Sawyer 491, at p. 496:

> "In *United States v. Martin*, 8 Saw. 478, it is 'conceded that the admission of Oregon into the Union upon an equality with the other states, without any special reservation of jurisdiction over the place then known and occupied as the Umatilla Indian reservation, extended the jurisdiction of the state thereover, as to all subjects constitutionally within its power of legislation—such as a crime committed thereon by one white man upon another, and it may be by one Indian upon another.'
>
> "But as this subject of the intercourse between the white man and the Indian is committed by the constitution to the government of the United States, and as congress has provided for the punishment of a white man for the felonious killing of an Indian upon this reservation, the *vice versa*, it is not admitted that the state has any authority over such killing, or power to punish or absolve the person committing the same."

The recognition of the dual sovereignty which actually existed continued to be acknowledged through the years by the following cases, amongst others: *United States v. Thomas*, 151 U.S. 577, 585, 14 S. Ct. 426, 38 L. Ed. 276; *Sperry Oil and Gas Co. v. Chisholm*, 264 U.S. 488, 497, 44 S. Ct. 372, 68 L. Ed. 803; *Surplus*

*Trading Co. v. Cook*, 281 U.S. 647, 650, 50 S. Ct. 455, 74 L. Ed. 1091.

The definition of this question as a state question by the Ninth Circuit Court of Appeals is accurate. Petitioner does not raise properly any issues as to the validity of the federal congressional pronouncement which withdrew the Federal Government from the field of jurisdiction over Indians, in Oregon.

## IV

## CONCLUSION

The petition for writ of certiorari should be denied, as was that following *Anderson v. Britton*, 212 Or. 1, 318 P. (2d) 291; cert. den. 356 U.S. 962, 78 S. Ct. 999, 2 L. Ed. (2d) 1068.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General of Oregon

HAROLD W. ADAMS
Assistant Attorney General
Attorneys for Respondent